DOCKET

SUPREME COURT

OF THE UNITED STATES

No.	10-1259
Title	United States, Petitioner v. Antoine Jones
Docketed	April 15, 2011
Linked with	10A760
Lower Ct.	United States Court of Appeals for the District of Columbia Circuit
Case Nos.	(08-3034)
Decision Date	August 6, 2010
Rehearing Denied	November 19, 2010
Questions Presented	

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 2 2011	Application (10A760) to extend the time to file a petition for a writ of certiorari from February 17, 2011 to March 19, 2011, submitted to The Chief Justice.
Feb 3 2011	Application (10A760) granted by The Chief Justice extending the time to file until March 18, 2011.
Mar 7 2011	Application (10A760) to extend further the time from March 18, 2011 to April 15, 2011 submitted to The Chief Justice.
Mar 8 2011	Application (10A760) granted by The Chief Justice extending the time to file until April 15, 2011.
Apr 15 2011	Petition for a writ of certiorari filed. (Response due May 16, 2011)
May 3 2011	Order extending time to file response to petition to and including June 15, 2011.
May 16 2011	Brief amici curiae of Gun Owners of America, Inc., et al. filed.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 7 2011	Brief of respondent Antoine Jones in opposition filed. (Distributed)
Jun 9 2011	Reply of petitioner United States filed. (Distributed)
Jun 27 2011	Petition GRANTED. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.
Aug 4 2011	The time to file respondent's brief on the merits is extended to and including September 26, 2011.
Aug 8 2011	SET FOR ARGUMENT ON Tuesday, November 8, 2011.
Aug 11 2011	Joint appendix filed.
Aug 11 2011	Brief of petitioner United States filed.
Aug 16 2011	Record received from U.S.C.A. for District of Columbia Circuit. (1 box)

Aug 16 2011	Record for U S D C for the Dustruct of Columbia Circuit is electronic
Aug 17 2011	Transcripts received from U S D C for the District of Columbia
Aug 18 2011	Brief amicus curiae of Center on the Administration of Criminal Law filed (Distributed)
Aug 19 2011	CIRCULATED
Sep 26 2011	Brief of respondent Antoine Jones filed (Distributed)
Oct 3 2011	Brief amici curiae of Electronic Privacy Information Center, et al filed (Distributed)
Oct 3 2011	Brief amici curiae of Gun Owners of America, Inc , et al filed (Distributed)
Oct 3 2011	Brief amici curiae of Center for Democracy & Technology et al filed (Distributed)
Oct 3 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al filed (Distributed)
Oct 3 2011	Brief amici curiae of Yale Law School Information Society Project Scholars et al filed (Distributed)
Oct 3 2011	Brief amicus curiae of Cato Institute filed (Distributed)
Oct 3 2011	Brief amicus curiae of Owner-Operator Independent Drivers Association, Inc filed (Distributed)
Oct 3 2011	Brief amicus curiae of Constitution Project filed (Distributed)
Oct 3 2011	Brief amicus curiae of Council on American-Islamic Relations filed (Distributed)
Oct 3 2011	Brief amicus curiae of Fourth Amendment Historians filed (Distributed)
Oct 3 2011	Brief amici curiae of American Civil Liberties Union, et al filed (Distributed)
Oct 3 2011	Brief amici curiae of The Rutherford Institute and the National Motorists Association filed (Distributed)
Oct 26 2011	Reply of petitioner United States filed (Distributed)
Nov 8 2011	Argued For petitioner Michael R Dreeben Deputy Solicitor General Department of Justice Washington, D C For respondent Stephen C Leckar Washington D C

PETITION FOR WRIT OF CERTIORARI

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

ANTOINE JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the warrantless use of a tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment.

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In the Supreme Court of the United States

No. 10-1259

UNITED STATES OF AMERICA

v.

ANTOINE JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 615 F.3d 544. The order of the court of appeals denying rehearing (App., *infra*, 43a), and the opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 44a-52a) are reported at 625 F.3d 766. The opinion of the district court granting in part and denying in part respondent's motion to suppress (App., *infra*, 53a-88a) is published at 451 F. Supp. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2010. A petition for rehearing was denied on November 19, 2010 (App., *infra*, 43a). On February 3, 2011, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including March 18, 2011. On March 8, Chief Justice Roberts further extended the time within which to file a petition for a writ of certiorari to and including April 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of conspiracy to distribute five kilograms or more of cocaine and 50 or more grams of cocaine base, in violation of 21 U.S.C. 841 and 846. The district court sentenced respondent to life imprisonment. Resp. C.A. App. 123-127. The court of appeals reversed respondent's conviction. App., *infra*, 1a-42a.

1. In 2004, a joint Safe Streets Task Force of the Federal Bureau of Investigation and the Metropolitan

Police Department began investigating respondent, who owned and operated a nightclub in the District of Columbia, for narcotics violations. App., *infra*, 2a. The agents used a variety of investigative techniques designed to link respondent to his co-conspirators and to suspected stash locations for illegal drugs. The agents conducted visual surveillance and installed a fixed camera near respondent's nightclub, obtained pen register data showing the phone numbers of people with whom respondent communicated by cellular phone, and secured a Title III wire intercept for respondent's cellular phone. *Id.* at 54a-55a; Gov't C.A. App. 73-74; Resp. C.A. App. 218-222, 227-289.

In addition to those techniques, the agents obtained a warrant from a federal judge in the District of Columbia authorizing them to covertly install and monitor a global positioning system (GPS) tracking device on respondent's Jeep Grand Cherokee. App., *infra*, 15a-16a, 38a-39a; Resp. C.A. App. 827.[1] The warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant and only within the District of Columbia, but the agents did not install the device until 11 days after the warrant was issued, and they installed it while the Jeep was parked in a public parking lot in Maryland. App., *infra*, 38a-39a. Agents also later replaced the device's battery while the Jeep was located in a different public parking lot in Maryland. Resp. C.A. App. 828, 832.

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[1] The Jeep was registered in the name of respondent's wife, but it was used exclusively by respondent. App., *infra*, 16a n.*; Resp. C.A. App. 826. Nevertheless, vehicle tracking devices provide information only about the vehicle's location; they do not reveal who is driving the car, what the driver and occupants are doing, and with whom they may meet at their destinations.

The GPS device communicated with orbital satellites to establish the device's location. Gov't C.A. App. 66. It was battery powered and accurate within 50 to 100 feet, *Id.* at 67, and it generated data only when the Jeep was moving. When the vehicle was not moving, the device was in "sleeping mode" in order to conserve its battery. *Id.* at 68-70. Using the device, agents were able to track respondent's Jeep in the vicinity of a suspected stash house in Fort Washington, Maryland, which confirmed other evidence of respondent driving his Jeep to and from that location. For example, respondent's presence at the Fort Washington stash house was also established by visual surveillance, including videotape and photographs of respondent driving his Jeep to and from that location. *Id.* at 75-76, 145-147; Resp. C.A. App. 844.

Based on intercepted calls between respondent and his suspected suppliers, investigators believed that respondent was expecting a sizeable shipment of cocaine during late October 2005. Gov't C.A. App. 215-218. On October 24, 2005, agents executed search warrants at various locations. They recovered nearly $70,000 from respondent's Jeep, and they recovered wholesale quantities of cocaine, thousands of dollars in cash, firearms, digital scales, and other drug-packaging paraphernalia from respondent's suspected customers. *Id.* at 137A, 222, 230A-F, 248B-N. Agents also recovered from the stash house in Fort Washington, Maryland, approximately 97 kilograms of powder cocaine, almost one kilogram of crack cocaine, approximately $850,000 in cash, and various items used to process and package narcotics. *Id.* at 83-93, 95; App., *infra*, 40a.

2. A federal grand jury sitting in the District of Columbia charged respondent with conspiring to distribute five kilograms or more of cocaine and 50 grams or more

of cocaine base, in violation of 21 U.S.C. 841 and 846; and 29 counts of using a communications facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). App, *infra*, 54a.

Before trial, respondent moved to suppress the data obtained from the GPS tracking device. Resp. C.A. App. 413, 560-567. Relying on *United States* v. *Knotts*, 460 U.S. 276 (1983), and *United States* v. *Karo*, 468 U.S. 705 (1984), the district court granted the motion in part and denied it in part, explaining that data obtained from the GPS device while the Jeep was on public roads was admissible, but that any data obtained while the Jeep was parked inside the garage adjoining respondent's residence must be suppressed. App., *infra*, 83a-85a. As a result, the GPS data introduced at trial related only to the movements of the Jeep on public roads. The jury acquitted respondent on a number of the charges and the district court declared a mistrial after the jury was unable to reach a verdict on the conspiracy charge. Gov't C.A. Br. 2-3.

A grand jury charged respondent in a superseding indictment with a single count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 846. Gov't C.A. App. 321. After a second trial, at which the GPS evidence again related only to the movements of the Jeep on public roads, a jury convicted respondent of the sole count in the indictment. App., *infra*, 3a. The district court sentenced respondent to life imprisonment and ordered him to forfeit $1,000,000 in proceeds from drug trafficking. Resp. C.A. App. 122-127.

3. The court of appeals reversed respondent's conviction. App., *infra*, 1a-42a.

a. The court acknowledged this Court's holding in *Knotts* that monitoring the public movements of a vehicle with the assistance of a beeper placed inside a container of chemicals was not a search within the meaning of the Fourth Amendment because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." App., *infra*, 17a (quoting *Knotts*, 460 U.S. at 281). The court concluded, however, that *Knotts* was not controlling because the officers in that case monitored a "discrete journey" of about 100 miles, rather than conducting prolonged monitoring of a vehicle over the course of several weeks. *Id.* at 17a-19a. The court noted that *Knotts* reserved whether a warrant would be required before police could use electronic devices as part of a "dragnet-type law enforcement practice[]," such as "twenty-four hour surveillance." *Id.* at 17a-18a (quoting *Knotts*, 460 U.S. at 283-284).

The court acknowledged that two other courts of appeals have held that prolonged GPS monitoring of a vehicle is not a Fourth Amendment search. App., *infra*, 20a-21a (citing *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515); *United States* v. *Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007)); see also *United States* v. *Marquez*, 605 F.3d 604 (8th Cir. 2010). The court found those cases inapplicable, stating that those defendants had not challenged the application of the holding in *Knotts* to prolonged surveillance. App., *infra*, 21a-22a.

b. After determining that it was not bound by *Knotts*, the court of appeals concluded that respondent had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month be-

cause he had not exposed the totality of those movements to the public. App., *infra*, 22a-31a. The government's use of a GPS device to monitor those movements, the court held, was therefore a search within the meaning of the Fourth Amendment. *Id.* at 22a-35a; see *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

First, the court concluded that respondent's movements while he drove on public roads in his Jeep were not "actually exposed" to the public. App., *infra*, 23a-27a. The court stated that "[i]n considering whether something is 'exposed' to the public as that term was used in *Katz*[,] we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." *Id.* at 23a. Applying that standard, the court concluded that "the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements * * * is essentially nil." *Id.* at 26a.

Second, the court rejected the argument that because each of respondent's individual movements was in public view, respondent's movements were "constructively exposed" to the public. App., *infra*, 27a-31a. The court explained that "[w]hen it comes to privacy, * * * the whole may be more revealing than the parts." *Id.* at 27a. Applying a "mosaic" theory, the court reasoned that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble," which can "reveal more about a person than does any individual trip viewed in isolation." *Id.* at 29a. The court concluded that a reasonable person "does not expect anyone to monitor and retain a record of every time he drives his car * * * rather, he

expects each of those movements to remain disconnected and anonymous." *Id.* at 31a.

Noting that seven States have enacted legislation requiring the government to obtain a warrant before it may use GPS tracking technology, App., *infra*, 33a-34a, the court of appeals further concluded that respondent's expectation of privacy in the month-long public movements of his Jeep was one that society was prepared to recognize as reasonable, *id.* at 31a-35a.

c. The court of appeals rejected the government's argument that the court's decision could invalidate the use of prolonged visual surveillance of persons or vehicles located in public places and exposed to public view. App., *infra*, 35a-38a. As a practical matter, the court suggested that police departments could not afford to collect the information generated by a GPS device through visual surveillance, but GPS monitoring, according to the court, "is not similarly constrained." *Id.* at 35a-36a. The court also explained that the constitutionality of prolonged visual surveillance was not necessarily called into question by its decision, because "when it comes to the Fourth Amendment, means do matter." *Id.* at 37a. For example, the court explained, police do not need a warrant to obtain information through an undercover officer, but they need a warrant to wiretap a phone. *Ibid.* The court ultimately decided to "reserve the lawfulness of prolonged visual surveillance" for another day. *Id.* at 37a-38a.

The court of appeals also rejected the government's argument that the search was nonetheless reasonable because, under the "automobile exception" to the Fourth Amendment's warrant requirement, see *Maryland* v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974), the agents could

have repeatedly searched respondent's vehicle based on probable cause without obtaining a warrant. App., *infra*, 38a-39a. The court observed that the government had not raised this argument in the district court, but nevertheless rejected the argument on the merits, stating that "the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate." *Id.* at 39a.

d. Finally, the court concluded that the district court's error in admitting evidence obtained by use of the GPS device was not harmless. App., *infra*, 39a-42a. The court rejected the government's contention that the other evidence linking respondent to the conspiracy was overwhelming and instead found that "the GPS data were essential to the Government's case." *Id.* at 41a. The court therefore reversed respondent's conviction. *Id.* at 1a-2a.

4. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 43a. Chief Judge Sentelle, joined by Judges Henderson, Brown, and Kavanaugh, dissented. *Id.* at 45a-49a. Chief Judge Sentelle explained that the panel's decision was inconsistent not only with the decisions of every other court of appeals to have considered the issue, but also with this Court's decision in *Knotts*. *Id.* at 45a. Chief Judge Sentelle observed that the Court's statement in *Knotts*, that nothing in the Fourth Amendment "prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," was "[c]entral to [its] reasoning." *Id.* at 46a (quoting *Knotts*, 460 U.S. at 282). He therefore concluded that "[e]verything

the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy," because "[t]here is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking [respondent] with a GPS." *Ibid.*

Chief Judge Sentelle found "unconvincing[]" the panel's attempt to distinguish *Knotts* "not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case," noting that "[t]he fact that no particular individual sees * * * all [of a person's public movements over the course of a month] does not make the movements any less public." App., *infra*, 46a-47a. Chief Judge Sentelle also criticized the panel opinion for giving law enforcement officers no guidance about "at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private." *Id.* at 47a. He noted that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem." *Id.* at 48a.

With regard to the panel's holding that respondent acquired a reasonable expectation of privacy in the totality of his movements over the course of a month because "that whole reveals more . . . than does the sum of its parts," Chief Judge Sentelle stated that the panel had failed to explain how the whole/part distinction affects respondent's reasonable expectation of privacy. App., *infra*, 47a-48a. He explained that "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum

of an infinite number of zero-value parts is also zero." *Ibid.* Whatever the whole revealed, Chief Judge Sentelle explained, the test of the reasonable expectation is not "in any way related to the intent of the user of the data obtained by the surveillance or other alleged search." *Id.* at 48a.

Finally, Chief Judge Sentelle noted, "[l]est the importance of this opinion be underestimated," that because the panel found that the privacy invasion was not in the agents' using a GPS device, "but in the aggregation of the information obtained," App., *infra*, 48a, the panel's opinion calls into question "any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel," *ibid.* Chief Judge Sentelle could not "discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented surveillance and a purely visual surveillance of substantial length." *Id.* at 48a-49a.

Judge Kavanaugh also dissented. App., *infra*, 49a-52a. In addition to the reasons set forth by Chief Judge Sentelle, Judge Kavanaugh would have granted rehearing to resolve respondent's alternative claim on appeal that the initial warrantless installation of the GPS device on his car violated the Fourth Amendment because it was "an unauthorized physical encroachment within a constitutionally protected area," which the panel did not address. *Ibid.* (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with this Court's longstanding precedent that a person traveling on public thoroughfares has no reasonable expectation of privacy in his movements from one place to an-

other, even if "scientific enhancements" allow police to observe this public information more efficiently. See *United States* v. *Knotts*, 460 U.S. 276, 282-284 (1983). The decision also creates a square conflict among the courts of appeals. The Seventh and Ninth Circuits have correctly concluded that prolonged GPS monitoring of a vehicle's movements on public roads is not a "search" within the meaning of the Fourth Amendment. The Eighth Circuit, in rejecting a challenge to GPS tracking, stated that a person has no reasonable expectation of privacy in his public movements, and it upheld tracking for a reasonable period based on reasonable suspicion. At a minimum, if GPS tracking were (incorrectly) deemed a search, the tracking in this case was likewise reasonable.

Prompt resolution of this conflict is critically important to law enforcement efforts throughout the United States. The court of appeals' decision seriously impedes the government's use of GPS devices at the beginning stages of an investigation when officers are gathering evidence to establish probable cause and provides no guidance on the circumstances under which officers must obtain a warrant before placing a GPS device on a vehicle. Given the potential application of the court of appeals' "aggregation" theory to other, non-GPS forms of surveillance, this Court's intervention is also necessary to preserve the government's ability to collect public information during criminal investigations without fear that the evidence will later be suppressed because the investigation revealed "too much" about a person's private life. Because the question presented in this case is important, and because the court of appeals' decision is wrong, this Court should intervene to resolve the conflict.

A. The Court Of Appeals' Decision Conflicts With Prior Decisions Of This Court

1. This Court has held that a "search" within the meaning of the Fourth Amendment occurs only where a "legitimate expectation of privacy * * * has been invaded by government action." *Knotts*, 460 U.S. at 280 (internal quotation marks omitted). As a result, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Applying those principles in *Knotts*, the Court held that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281.

In *Knotts*, police officers, without obtaining a warrant, installed an electronic beeper in a container of chemicals that was subsequently transported in a vehicle. 460 U.S. at 277. The police officers used the beeper to supplement their visual surveillance of the vehicle, and the Court stated that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Id.* at 282.

The court of appeals' decision is in significant tension, if not outright conflict, with *Knotts*. As in *Knotts*, respondent had "no reasonable expectation of privacy in his movements from one place to another" as he traveled on public roads, 460 U.S. at 281, because those movements were all in public view. The enhanced accuracy of GPS technology, compared to the beeper used in *Knotts*, does not change the analysis. See *id.* at 284 ("Insofar as respondent's complaint appears to be * * * that scientific devices such as the beeper enabled the police to be

more effective in detecting crime, it simply has no constitutional foundation."); *Smith* v. *Maryland*, 442 U.S. 735, 744-745 (1979) (noting that petitioner had conceded that he would have no reasonable expectation of privacy in the phone numbers he dialed if he had placed the calls through an operator, and stating that "[w]e are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate"). Electronic tracking of a vehicle as it moves on public roads offends no reasonable expectation of privacy because it reveals only information that any member of the public could have seen, and it is therefore not a search within the meaning of the Fourth Amendment. See *Katz*, 369 U.S. at 351.

2. The court of appeals concluded that it was not bound by *Knotts* because that case involved a "discrete journey" of 100 miles, while this case involves "prolonged" GPS tracking over the course of roughly a month. App., *infra*, 17a-20a. That distinction makes no difference. The Court's decision in *Knotts* was based on the premise that the driver had no reasonable expectation of privacy in movements that were exposed to public view, not on the length of time the beeper was in place. 460 U.S. at 284-285.

Furthermore, even if the holding of *Knotts* was limited to police monitoring of short journeys on public roads with the assistance of electronic surveillance, the Court applied the same Fourth Amendment principles to prolonged electronic tracking in *United States* v. *Karo*, 468 U.S. 705, 715 (1984). In *Karo*, agents placed a tracking device in a can of ether and left the device in place for five months as the can was transported between different locations. *Id.* at 709-710. The Court held that certain transmissions from the beeper during

that prolonged period—*i.e.*, those that revealed information about private spaces—could not be used to establish probable cause in an application for a warrant to search a residence, but the Court's holding on that point did not depend upon the duration of the electronic monitoring. *Id.* at 714-718. Although the court of appeals had distinguished *Knotts* on the ground that "[t]he *Knotts* case involved surveillance over only a few days; monitoring in [this] case took place over five months," *United States* v. *Karo*, 710 F.2d 1433, 1439 (10th Cir. 1983), rev'd, 468 U.S. 705 (1984), the Court concluded that the remaining evidence, including "months-long tracking" of the ether can through "visual and beeper surveillance," established probable cause supporting issuance of the warrant. *Karo*, 468 U.S. at 719-720. The Court expressed no concern about the prolonged monitoring.

The GPS monitoring in this case was not "dragnet" surveillance, which the Court in *Knotts* stated it would leave for another day. 460 U.S. at 284. The Court generally has used the term "dragnet" to refer to high-volume searches that are often conducted without any articulable suspicion. See, *e.g.*, *Florida* v. *Bostick*, 501 U.S. 429, 441 (1991); *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in *Davis* v. *Mississippi*, 394 U.S. 721 (1969)); *Berger* v. *New York*, 388 U.S. 41, 65 (1967). That scenario is not presented here. The agents in this case tracked the movements of a single vehicle driven by an individual reasonably suspected of cocaine trafficking. Even if this were (incorrectly) deemed a Fourth Amendment search, it would be a reasonable one. This record raises no concerns about mass, suspicionless GPS monitoring; "the fact is that the 'reality hardly suggests abuse.'" *Knotts*, 460 U.S. at 283-284 (quoting *Zurcher*

v. *Stanford Daily*, 436 U.S. 547, 566 (1978)). Any constitutional questions about hypothetical programs of mass surveillance can await resolution if they ever occur.

3. Even assuming this case is not squarely controlled by *Knotts*, the court of appeals misapplied this Court's Fourth Amendment cases to hold that respondent had a reasonable expectation of privacy in the totality of his public movements, even if every individual movement was exposed to the public. The court of appeals stated that to determine whether something is "exposed to the public," "we ask not what another person can physically and may lawfully do[,] but rather what a reasonable person expects another might actually do." App., *infra*, 23a. This Court's cases lend no support to the court of appeals' view that public movements can acquire Fourth Amendment protection based on the lack of "likelihood" that anyone will observe them. *Id.* at 26a.

In support of its approach (App., *infra*, 23a, 24a-25a), the court of appeals cited *California* v. *Greenwood*, 486 U.S. 35 (1988), and *Bond* v. *United States*, 529 U.S. 334 (2000), both of which involve tactile observation of items that were not visually exposed to the public. In *Greenwood*, the Court held that the defendant lacked a reasonable expectation of privacy in the contents of trash bags that he placed on the curb in front of his house. 486 U.S. at 41. The Court acknowledged that the defendants may have had a "subjective" expectation of privacy based on the unlikelihood that anyone would inspect their trash after they placed it on the curb "in opaque plastic bags" to be picked up by the garbage collector after a short period of time. *Id.* at 39. But that expectation, the Court held, was not "objectively reasonable." *Id.* at 40. Instead, the Court held that once the

defendants placed the bags on the curb where they were readily accessible to anyone who wanted to look inside, "the police [could not] reasonably be expected to avert their eyes from evidence of criminal activity that *could have been* observed by any member of the public." *Id.* at 41 (emphasis added).

In *Bond*, the Court held that, unlike the opaque trash bags left on the curb in *Greenwood*, a bus passenger who places his opaque duffle bag in an overhead compartment does not "expose" his bag to the public for the type of "physical manipulation" that a border patrol agent engaged in to investigate the bag's contents. *Bond*, 529 U.S. at 338-339. The Court in *Bond* explicitly distinguished "visual, as opposed to tactile, observation" of an item in a public place, noting that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337.

The law enforcement investigations in *Greenwood* and *Bond* went beyond conducting visual surveillance of an item that was placed in public view, but even in *Greenwood*, the Court attached no importance to the subjective expectation that "there was little likelihood" that anyone would inspect the defendants' trash. 486 U.S. at 39. And the Court has never engaged in a "likelihood" analysis for cases involving visual surveillance of public movements like those at issue in this case. In *Knotts*, for example, the Court did not analyze the likelihood that someone would follow a vehicle during a 100-mile trip from Minnesota to Wisconsin. Instead, the Court stated that the use of a beeper to track the vehicle "raise[d] no constitutional issues which visual surveillance would not also raise" because "[a] police car following [the vehicle] at a distance throughout [the] journey *could have* observed [the defendant] leaving the

public highway and arriving at the cabin," *Knotts*, 460 U.S. at 285 (emphasis added), just as respondent's Jeep could have been observed through extensive visual and physical surveillance.

The court of appeals' reliance (App., *infra*, 23a-24a) on this Court's "flyover" cases, see *California* v. *Ciraolo*, 476 U.S. 207 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989), is similarly misplaced. *Ciraolo* and *Riley* involved visual inspections of private areas (the curtilage of homes), not public movements. In both cases, the Court acknowledged that although the defendants had exhibited actual expectations of privacy in their backyards, those expectations were not reasonable "[i]n an age where private and commercial flight in the public airways is routine." *Ciraolo*, 476 U.S. at 215.[2] The Court's likelihood analysis in those cases determined whether something ordinarily private was sufficiently "exposed" to the public to make an expectation of privacy in that area unreasonable. In the case of movements of a vehicle on public highways, that information has clearly already been exposed to the public. See *Knotts*, 460 U.S. at 285.

Finally, this Court has not "implicitly recognized" (App., *infra*, 28a) a distinction between a whole and the sum of its parts in analyzing whether something has been "exposed" to the public for purposes of the Fourth Amendment. In support of this proposition (*id.* at 27a-29a), the court of appeals cited *United States Department of Justice* v. *Reporters Committee for Freedom of*

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[2] As the court of appeals noted (App., *infra*, 24a), Justice O'Connor's concurrence in *Riley* clarifies that she believed that the defendant's backyard had been "exposed" to the public not because it was possible or legal for commercial planes to fly over the area, but because overflight was common. 488 U.S. at 453.

the Press, 489 U.S. 749 (1989), and *Smith*, *supra*, neither of which offers any support for the court of appeals' decision. *Reporters Committee for Freedom of the Press* is a Freedom of Information Act case addressing whether an individual has a privacy interest in his "rap sheet," which compiled "scattered bits" of public information, not "'freely available' * * * either to the officials who have access to the underlying files or to the general public." 489 U.S. at 764, 769. Its analysis does not inform, let alone resolve, the question of whether an individual who exposes his or her movements to the public retains a reasonable expectation of privacy in the sum of those movements.

And in *Smith*, the Court did not consider, as the court of appeals stated (App., *infra*, 28a), "whether [a person] expects all the numbers he dials to be compiled in a list" in determining whether a person has an *objectively* reasonable expectation of privacy in the phone numbers he dials. The Court, instead, noted that a person "see[s] a list of their * * * calls on their monthly bills" in supporting the Court's prior conclusion that individuals would not "in general entertain any actual expectation of privacy in the numbers they dial," and thus would lack a *subjective* expectation of privacy. *Smith*, 442 U.S. at 742. The Court's ultimate conclusion was that any subjective expectation of privacy a person has in the phone numbers he dials is objectively unreasonable, because when a person uses his phone, he "voluntarily convey[s] numerical information to the telephone company," thereby "'expos[ing]' th[e] information" to a third party. *Id.* at 744.

As Chief Judge Sentelle stated in his dissent from the denial of rehearing en banc, "[t]he reasonable expectation of privacy as to a person's movements on the high-

way is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." App., *infra*, 47a-48a. Nothing in this Court's Fourth Amendment cases supports the court of appeals' "aggregation" theory that a person can maintain a reasonable expectation of privacy in the totality of his public movements, each of which is "conveyed to anyone who want[s] to look." *Knotts*, 460 U.S. at 281.

B. The Court of Appeals' Decision Creates A Conflict Among The Circuits

The court of appeals' decision also creates a conflict among the circuits. The Seventh and Ninth Circuits have held that prolonged GPS monitoring of a vehicle's public movements is not a search within the meaning of the Fourth Amendment. See *United States* v. *Garcia*, 474 F.3d 994, 996-998 (7th Cir.), cert. denied, 552 U.S. 883 (2007); *United States* v. *Pineda-Moreno*, 591 F.3d 1212, 1216-1217 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515). In addition, the Eighth Circuit in rejecting a challenge to GPS tracking, has stated that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another." *United States* v. *Marquez*, 605 F.3d 604, 609 (2010). That conflict provides a compelling reason for the Court to intervene.

In *Pineda-Moreno*, after obtaining information that the defendant might be involved in drug trafficking, agents from the Drug Enforcement Administration (DEA) "repeatedly monitored [his] Jeep using various types of mobile tracking devices" "[o]ver a four-month period." 591 F.3d at 1213. After a tracking device alerted the agents that Pineda-Moreno was leaving a sus-

pected marijuana grow site, agents stopped the vehicle and smelled marijuana emanating from the backseat, and they found two large garbage bags of marijuana during a search of Pineda-Moreno's residence. *Id.* at 1214. Although Pineda-Moreno had not raised the argument in the district court, the Ninth Circuit rejected the argument that "the agents' use of mobile tracking devices continuously to monitor the location of his Jeep violated his Fourth Amendment rights." *Id.* at 1216. The court held that the use of a GPS device to track Pineda-Moreno's vehicle was not a Fourth Amendment search because "[t]he only information the agents obtained from the tracking devices was a log of the locations where Pineda-Moreno's car traveled, information the agents could have obtained by following the car." *Ibid.*[3]

In *Garcia*, police officers received information that Garcia was manufacturing methamphetamine, and they placed a GPS device on his car without applying for a warrant. 474 F.3d at 995. When they later retrieved the

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[3] Chief Judge Kozinski, joined by Judges Reinhardt, Wardlaw, Paez, and Berzon, dissented from the Ninth Circuit's denial of rehearing en banc. *United States* v. *Pineda-Moreno*, 617 F.3d 1120 (2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515). Chief Judge Kozinski believed that the expectation of privacy in one's driveway (as "curtilage") is the same as in the home itself and that the agents' installation of the device while the vehicle was parked in the defendant's driveway was therefore problematic. *Id.* at 1121-1123. He also believed that rehearing en banc was warranted to address whether prolonged warrantless surveillance using a GPS device is permissible under the Fourth Amendment, given this Court's decision in *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001), to "take the long view" from the original meaning of the Fourth Amendment in order to guard against advances in technology that can erode Fourth Amendment privacy interests. *Pineda-Moreno*, 617 F.3d at 1124.

device, they could see the car's travel history. *Ibid.* The Seventh Circuit held that no warrant was required to conduct continuous electronic tracking using a GPS device because the device was a "substitute * * * for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment." *Id.* at 997.

The Eighth Circuit similarly concluded that a warrant was not required in *Marquez*. In that case, DEA agents placed a GPS device on a truck that the agents believed was involved in drug trafficking. 605 F.3d at 607. The agents changed the battery on the device seven times over the course of a prolonged investigation, and the device "allowed police to determine" that the truck was traveling back and forth between Des Moines, Iowa, and Denver, Colorado. *Ibid.* The Eighth Circuit held that the defendant did not have "standing" to challenge the warrantless use of the GPS device because he was only an occasional passenger in the vehicle. *Id.* at 609. But the court further concluded that "[e]ven if [the defendant] had standing, we would find no error." *Ibid.* The court stated that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another," *ibid.*, and concluded that "when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time," *id.* at 610.[4]

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[4] In addition, appellate courts in Virginia, Wisconsin, and Maryland have concluded that police officers do not need to obtain a warrant before using a GPS device to track the movements of a vehicle on public roads. See *Foltz* v. *Commonwealth*, 698 S.E.2d 281, 285-292 (Va. Ct.

The D.C. Circuit's contrary opinion in this case creates a division of authority in the federal courts of appeals.[5] The conflict became intractable when the D.C. Circuit denied the government's petition for rehearing en banc in this case. App., *infra*, 49a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting conflict with Seventh, Eighth, and Ninth Circuits). This Court's intervention is therefore necessary to resolve the conflict.

C. The Question Presented Is Of Substantial And Recurring Importance

This Court's resolution of the question presented is critically important to law enforcement efforts through-

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App. 2010) (use of GPS monitoring device not a Fourth Amendment search where police officer "could have followed and personally recorded the movements" of defendant's vehicle without violating any recognized right of privacy), aff'd on other grounds, No. 0521-09-4, 2011 WL 1233563 (Va. Ct. App. Apr. 5, 2011) (en banc); *State* v. *Sveum*, 769 N.W.2d 53, 57-61 (Wis. Ct. App. 2009) (holding that no Fourth Amendment search or seizure occurs "when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view"); *Stone* v. *State*, 941 A.2d 1238, 1249-1250 (Md. Ct. Spec. App. 2008) (holding trial court did not abuse its discretion in cutting short defendant's cross-examination about a GPS tracking device because defendant had no reasonable expectation of privacy in his location while he traveled on public thoroughfares).

[5] Several state courts have also held that police use of GPS devices to monitor the public movements of vehicles is unlawful, but have done so only under their respective state constitutions, and not under the Fourth Amendment. See *People* v. *Weaver*, 909 N.E.2d 1195, 1202 (N.Y. 2009); *Commonwealth* v. *Connolly*, 913 N.E.2d 356, 366-372 (Mass. 2009); *State* v. *Jackson*, 76 P.3d 217, 224 (Wash. 2003); *State* v. *Campbell*, 759 P.2d 1040, 1049 (Or. 1988); but see *Osburn* v. *State*, 44 P.3d 523, 524-526 (Nev. 2002) (upholding attachment of electronic monitoring device under state constitution).

out the United States. The court of appeals' decision, if allowed to stand, would stifle the ability of law enforcement agents to follow leads at the beginning stages of an investigation, provide no guidance to law enforcement officers about when a warrant is required before placing a GPS device on a vehicle, and call into question the legality of various investigative techniques used to gather public information. GPS tracking is an important law enforcement tool, and the issue will therefore continue to arise frequently. This Court should intervene to clarify the governing legal principles that apply to an array of investigative techniques, and to establish when GPS tracking may lawfully be undertaken.

1. The court of appeals' decision, which will require law enforcement officers to obtain a warrant before placing a GPS device on a vehicle if the device will be used for a "prolonged" time period, has created uncertainty surrounding the use of an important law enforcement tool. Although in some investigations the government could establish probable cause and obtain a warrant before using a GPS device, federal law enforcement agencies frequently use tracking devices early in investigations, before suspicions have ripened into probable cause. The court of appeals' decision prevents law enforcement officers from using GPS devices in an effort to gather information *to establish* probable cause, which will seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, and other crimes.

2. Additionally, the court of appeals' opinion gives no guidance to law enforcement officers about when a warrant is required. Use of a GPS device for a few hours (or perhaps a few days) is presumably still acceptable under *Knotts*. But the court's opinion offers no

workable standard for law enforcement officers to determine how long a GPS device must remain in place before their investigation reveals enough information to offend a reasonable expectation of privacy (and therefore become a Fourth Amendment search). See App., *infra*, 48a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem").

3. Significantly, the court of appeals' legal theory that the aggregation of public information produces a Fourth Amendment search, even when short periods of surveillance would not, has the potential to destabilize Fourth Amendment law and to raise questions about a variety of common law enforcement practices. Protracted use of pen registers, repeated trash pulls, aggregation of financial data, and prolonged visual surveillance can all produce an immense amount of information about a person's private life. Each of these practices has been held not to be a Fourth Amendment search. See *Smith*, 442 U.S. at 745-746; *Greenwood*, 486 U.S. at 44-45; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Karo*, 468 U.S. at 721. But under the court of appeals' theory, these non-search techniques could be transformed into a search when used over some undefined period of time or in combination. Just as "[a] reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there," App., *infra*, 31a, a person does not expect anyone to pull his trash every day for six weeks, or monitor the phone numbers he dials for months, or

review every credit card statement he receives and every check he writes for years. The court of appeals "aggregation" theory thus has limitless potential to require courts to draw impossible lines between the moderate degree of review or observation permitted under the court's approach, and the excessive or prolonged degree that becomes a search.

4. Finally, the use of GPS tracking devices is a common law enforcement investigative technique, and the question presented is therefore of recurring importance. In the wake of the decision in this case, suppression motions based on the use of prolonged GPS tracking have proliferated. Two motions have recently been decided in the government's favor. See *United States* v. *Walker*, No. 2:10-cr-00032, 2011 WL 651414, at 2-3 (W.D. Mich. Feb. 11, 2011) (noting that issue of warrantless GPS tracking "is a contentious issue regarding which there have been great differences of opinion among the federal courts" and holding that warrantless GPS tracking of vehicle did not constitute Fourth Amendment search under the "steadfastly cardinal rule in a universe of varying expectations," that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection") (brackets in original) (internal quotation marks omitted); *United States* v. *Sparks*, No. 10-10067-WGY (D. Mass. Nov. 10, 2010) (noting that "[t]he proper inquiry * * * is not what a random stranger would actually do or likely do, but rather what he feasibly could," and holding that warrantless GPS tracking of a vehicle for 11 days was not a Fourth Amendment search). Additional motions filed or supplemented after the court of appeals' opinion in this case remain pending in the district courts. See, *e.g.*, Docket entry No. 47, *United States* v. *Oladosu*,

No. 1:10-cr-00056-S-DLM (D.R.I. Jan. 21, 2011) (motion to suppress evidence obtained through warrantless use of GPS device); Docket entry No. 48, *United States* v. *Lopez*, No. 1:10-cr-00067-GMS (D. Del. Feb. 8, 2011) (expanding previous suppression motion to request suppression of evidence obtained from GPS devices attached to various vehicles driven by defendant), and Docket entry No. 54, *Lopez*, *supra* (Mar. 4, 2011) (continuing trial date and reopening hearing on defendant's suppression motion); Docket entry No. 99, *United States* v. *Santana*, No. 1:09-cr-10315-NG (D. Mass. Nov. 19, 2010) (supplemental memorandum in support of suppression motion; expanding original suppression motion to include request for suppression of evidence obtained through warrantless use of GPS device). This litigation will continue unabated in the absence of a definitive resolution of the conflict by this Court. And confusing or inconsistent case law with respect to GPS tracking or other means of acquiring or aggregating data not normally thought of as a search will hamper important law enforcement interests. This Court's intervention to forestall those consequences is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3030, Consolidated with No. 08-3034

UNITED STATES OF AMERICA, APPELLEE

v.

LAWRENCE MAYNARD, APPELLANT

Argued: Nov. 17, 2009
Decided and Filed: Aug. 6, 2010

OPINION

Before: GINSBURG, TATEL and GRIFFITH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: **The appellants, Antoine Jones and Lawrence Maynard, appeal their convictions after a joint trial for conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. Maynard also challenges the sentence imposed by the district court. Because the appellants' convictions arise from the same underlying facts and they make several overlapping arguments,** we consolidated their appeals. For the reasons that fol-

low, we reverse Jones's and affirm Maynard's convictions.

I. Background

Jones owned and Maynard managed the "Levels" nightclub in the District of Columbia. In 2004 an FBI Metropolitan Police Department Safe Streets Task Force began investigating the two for narcotics violations. The investigation culminated in searches and arrests on October 24, 2005. We discuss that investigation and the drug distribution operation it uncovered in greater detail where relevant to the appellants' arguments on appeal.

On October 25 Jones and several alleged co-conspirators were charged with, among other things, conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base. Maynard, who was added as a defendant in superseding indictments filed in March and June 2006, pled guilty in June 2006.

In October 2006 Jones and a number of his co-defendants went to trial. The jury acquitted the co-defendants on all counts but one; it could not reach a verdict on the remaining count, which was eventually dismissed. The jury acquitted Jones on a number of counts but could not reach a verdict on the conspiracy charge, as to which the court declared a mistrial. Soon thereafter the district court allowed Maynard to withdraw his guilty plea.

In March 2007 the Government filed another superseding indictment charging Jones, Maynard, and a few co-defendants with a single count of conspiracy to distribute and to possess with intent to distribute five or more kilograms of cocaine and 50 or more grams of co-

caine base. A joint trial of Jones and Maynard began in November 2007 and ended in January 2008, when the jury found them both guilty.

II. Analysis: Joint Issues

Jones and Maynard jointly argue the district court erred in (1) admitting evidence gleaned from wiretaps of their phones, (2) admitting evidence arising from a search incident to a traffic stop, (3) denying their motion to dismiss the indictment as invalid because it was handed down by a grand jury that had expired, (4) declining to instruct the jury on their theory that the evidence at trial suggested multiple conspiracies, and (5) declining to grant immunity to several defense witnesses who invoked the Fifth Amendment to the Constitution of the United States and refused to testify. Jones also argues the court erred in admitting evidence acquired by the warrantless use of a Global Positioning System (GPS) device to track his movements continuously for a month.* After concluding none of the joint issues warrants reversal, we turn to Jones's individual argument.

A. Wiretaps

Before their first trial Jones and his co-defendants moved to suppress evidence taken from wiretaps on

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* Maynard waves at one individual argument, to wit, that "the district court erred in using acquitted conduct to calculate his guideline range" but, in the same sentence, concedes his argument "is foreclosed by" precedent, *e.g.*, *United States v. Dorcely*, 454 F.3d 366 D.C. Cir. 2006) (district court's consideration of prior acquitted conduct did not violate the Fifth or Sixth Amendments to the Constitution of the United States). He nonetheless "raises this issue to preserve his argument in anticipation of future changes in the law and/or *en banc* review." So be it.

Jones's and Maynard's phones. The police had warrants for the wiretaps, but the defendants argued the issuing court abused its discretion in approving the warrants because the applications for the warrants did not satisfy the so-called "necessity requirement," *see* 18 U.S.C. § 2518(3)(c) ("normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tied or to be too dangerous"); *see also, e.g.*, *United States v. Becton*, 601 F.3d 588, 596 (D.C. Cir. 2010). They also moved for a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), into the credibility of one of the affidavits offered in support of the warrant. The district court denied both motions. 451 F. Supp. 2d 71, 78-79, 81-83 (2006). Before his second trial Jones moved the court to reconsider both motions; Maynard adopted Jones's motions and made an additional argument for a *Franks* hearing. The district court held Jones's motion for reconsideration added nothing new and denied it for the reasons the court had given before the first trial. 511 F. Supp. 2d 74, 77 (2007). The court then denied Maynard's separate motion for a *Franks* hearing. *Id.* at 78. The appellants appeal the district court's denial of their motions to suppress and for a *Franks* hearing.

As for their motions to suppress, the district court held the applications for the warrants "amply satisfie[d]" the necessity requirement because they recounted the ordinary investigative procedures that had been tied and explained why wiretapping was necessary in order to "ascertain the extent and structure of the conspiracy." 451 F. Supp. 2d at 83. We review the court's "necessity determination" for abuse of discretion. *United States v. Sobamowo*, 892 F.2d 90, 93 (D.C. Cir. 1989).

The appellants do not directly challenge the reasoning of the district court; rather they suggest sources of information to which the police hypothetically might have turned in lieu of the wiretaps, to wit, cooperating informants, controlled buys, and further video surveillance. At best, the appellants suggest investigative techniques that might have provided some of the evidence needed, but they give us no reason to doubt the district court's conclusion that "[h]aving engaged in an adequate range of investigative endeavors, the government properly sought wiretap permission and was not required to enumerate every technique or opportunity missed or overlooked." 451 F. Supp. 2d at 82 (quoting *Sobamowo*, 892 F.2d at 93).

The appellants also requested a hearing into the credibility of the affidavit submitted by Special Agent Yanta in support of the wiretap warrants. An affidavit offered in support of a search warrant enjoys a '"presumption of validity," *Franks*, 438 U.S. at 171, but

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56. The substantial showing required under *Franks* must be "more than conclusory" and "accompanied by an offer of proof." *United States v. Gatson*, 357 F.3d 77, 80 (D.C. Cir. 2004) (quoting *Franks*).

The appellants argued Yanta intentionally or at least recklessly both mischaracterized certain evidence and omitted any mention in her affidavit of Holden, an informant whom the appellants think might have assisted the investigation. The district court denied the motion, holding the appellants had satisfied neither the substantial showing nor the materiality requirement for a *Franks* hearing. 451 F. Supp. 2d at 78-79; 511 F. Supp. 2d at 77-78.

As we recently noted, "[t]he circuits are split on the question whether a district court's decision not to hold a *Franks* hearing is reviewed under the clearly erroneous or *de novo* standard of review," and "[w]e have not definitively resolved the issue in this circuit." *United States v. Becton*, 601 F.3d 588, 594 (2010) (internal quotation marks deleted). We need not resolve the issue today because even proceeding *de novo* we would agree with the district court: The appellants did not make the requisite substantial preliminary showing that Yanta, in her affidavit, intentionally or recklessly either described the evidence in a misleading way or failed to mention Holden. Lacking any probative evidence of Yanta's *scienter*, the appellants argue the district court should have inferred Yanta knew about Holden and intentionally failed to mention him because his name must have "flashed across the Task Force's team computer screens." This is speculation, not a substantial showing, and no basis upon which to question the ruling of the district court. *See United States v. Richardson*, 861 F.2d 291, 293 D.C. Cir. 1988) (affidavit in support of warrant not suspect under *Franks* where "there has been absolutely no showing [the affiant] made the statements with scienter").

B. Traffic Stop

In 2005 Officer Frederick Whitehead, of the Durham, North Carolina Police Department, pulled over Jones's minivan for speeding. Because we consider the "evidence in the light most favorable to the Government," *Evans v. United States*, 504 U.S. 255, 257 (1992), what follows is the Officer's account of the incident.

Maynard was driving and one Gordon was asleep in the passenger seat; Jones was not present. At the officer's request Maynard walked to the rear of the vehicle. There, in response to Whitehead's questioning, Maynard said he worked for a nightclub in D.C. and was driving to South Carolina to pick up a disc jockey and to bring him back for an event. When asked about his passenger, Maynard claimed not to know Gordon's last name or age. Whitehead then addressed Gordon, who had awakened and whom he thought seemed nervous, and asked him where he was going. Gordon told a different story: He and Maynard were headed to Georgia in order to meet relatives and some girls.

Whitehead then went to speak with his partner, who had arrived in a separate car. After relating the suspicious conflict in the stories he had been told, Whitehead called for a canine unit and ran the usual checks on Maynard's license and registration. He then returned to the rear of the van, where Maynard was still standing, gave Maynard back his identification, along with a warning citation, and told him he was free to leave. By that time, the canine unit had arrived on scene but remained in their vehicle. Maynard moved toward the front of the van and, as he reached to open the driver's side door, Whitehead called out "do you mind if I ask you a few

additional questions?" Maynard turned around and walked back toward Whitehead, who then asked him if he was transporting any large sums of money, illegal weapons, or explosives. Maynard "looked scared," said nothing, closed his eyes, and held his breath. He then looked at the rear of the van, told Whitehead he had a cooler he had meant to put some ice in, and reached toward the rear latch. Whitehead said not to open the door and asked Maynard if he would consent to a search; when Maynard said "yes," Whitehead frisked Maynard for weapons, asked Gordon to step out of the vehicle, frisked him for weapons, and then gave the canine unit the go-ahead. The dog alerted while sniffing around the car, and the ensuing search of the van turned up $69,000 in cash.

Before trial the appellants moved unsuccessfully to suppress evidence from the traffic stop, arguing, as they do now, that by extending the traffic stop after giving Maynard his written warning the police (1) unreasonably seized Maynard, *see Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"), and (2) unreasonably searched the van, all in violation of the Fourth Amendment to the Constitution of the United States. The district court held the extended stop was not a seizure because Maynard was free to leave and, if it was a seizure, then it was lawful because it was supported by reasonable suspicion. As for the search of the van, the district court held the canine sniff was not a search and, once the canine alerted, the police had probable cause to search the vehicle. "We consider a district court's legal rulings on a suppression motion *de novo*

and review its factual findings for clear error giving due weight to inferences drawn from those facts and its determination of witness credibility." *United States v. Holmes*, 505 F.3d 1288, 1292 (D.C. Cir. 2007) (internal quotation marks deleted).

In determining whether a person has been seized within the meaning of the Fourth Amendment, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991). This inquiry "tak[es] into account all of the circumstances surrounding the encounter," *id.*, in the light of which we ask "not whether the citizen [in this case] perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that [message] to a reasonable person," *California v. Hodari D.*, 499 U.S. 621, 628 (1991). So it is that "[a] stop or seizure takes place only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *United States v. Jones*, 584 F.3d 1083, 1086 (D.C. Cir. 2009) (internal quotation marks omitted); *see also* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51, 60 (2009) ("The Court has declined to find seizures based on mere interaction with law enforcement without a showing of some degree of outward coercion"). Whether a seizure has taken place "is a legal conclusion that this court reviews *de novo*." *United States v. Jordan*, 958 F.2d 1085, 1086 (D.C. Cir. 1992).

The appellants argue Maynard was seized because, when Officer Whitehead told Maynard he was free to go,

he "had already decided that he was going to search the van. . . . Whitehead had no intention of letting him go until after he [had searched it]." This assertion, even if true, has no bearing upon whether a reasonable person would have felt free to decline Whitehead's request. That Maynard seemed nervous when Whitehead asked him whether he was carrying any contraband or large sums of money, which Maynard offers as further evidence he was "under duress," is irrelevant for the same reason.

We agree with the district court that, considering all the circumstances surrounding the stop, a reasonable person in Maynard's position would have felt free to decline Whitehead's request that he answer "a few additional questions." *See United States v. Wylie*, 569 F.2d 62, 67 (D.C. Cir. 1977) ("police-citizen communications which take place under circumstances in which the citizen's 'freedom to walk away' is not limited by anything other than his desire to cooperate do not amount to 'seizures' of the person"). Whitehead had already returned Maynard's license and registration and told him he was free to go. Although there were by that time three police cars (two of which were unmarked) on the scene, Whitehead's words and actions unambiguously conveyed to Maynard his detention was at an end. After that, Maynard returned to the front of the van—a clear sign he thought he was free to go. By remaining behind the vehicle as Maynard left, Whitehead further assured Maynard he would not impede his leaving. Finally, Maynard turned around and came back only when Whitehead reinitiated the stop by asking him if he would answer a few more questions. That Whitehead shouted the question might in some circumstances turn it into a show of authority, but not here; the two were standing

some distance apart on the side of a noisy interstate highway. In sum, the police did not seize Maynard by asking him whether he would answer a few more questions.

The appellants' brief might be read to argue the extension of the stop, from the time Whitehead frisked Maynard until the dog alerted, was a separate seizure. *See United States v. Alexander*, 448 F.3d 1014, 1016 (8th Cir. 2006) (dog sniff "may be the product of an unconstitutional seizure [] if the traffic stop is unreasonably prolonged before the dog is employed"). If Maynard's and Gordon's inconsistent statements, Maynard's claimed lack of knowledge about Gordon, and Gordon's nervousness had not already created "reasonable suspicion to believe that criminal activity [was] afoot," *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks deleted), however, then surely the addition of Maynard's agitated reaction to Whitehead's renewed questioning did, *see Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("nervous, evasive behavior is a pertinent factor in determining reasonable suspicion").

The parties also dispute whether Maynard's consent to the search of the van was voluntary and whether Jones has standing to challenge that search. Those issues are mooted by our holding the extension of the stop to ask Maynard a few additional questions was not a seizure and any subsequent extension of the stop leading up to the canine sniff was supported by reasonable suspicion. The appellants do not dispute the district court's determination that the police had probable cause to search the van once the dog alerted. Accordingly, we hold the district court properly admitted evidence the police discovered by searching the van.

C. Superseding Indictment

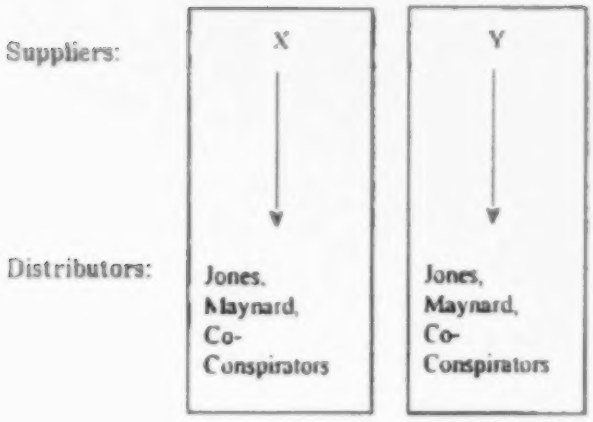
The appellants argue the indictment returned June 27, 2006 was invalid because it was returned by a grand jury whose term had expired. As the Government points out, the validity of that indictment is irrelevant here because the appellants were charged and tried pursuant to the superseding indictment returned by a different grand jury on March 21, 2007. The appellants point to no infirmity in the relevant indictment.

D. Multiple Conspiracies

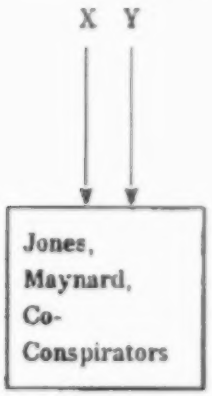
At trial the appellants asked the court to instruct the jury that proof of multiple separate conspiracies is not proof of one larger conspiracy. The district court denied that request, which the appellants argue was reversible error under *United States v. Graham*, 83 F.3d 1466, 1472 (D.C. Cir. 1996): "To convict, the jury must find appellants guilty of the conspiracy charged in the indictment, not some other, separate conspiracy"; therefore, "if record evidence supports the existence of multiple conspiracies, the district court should . . . so instruct[] the jury."

The appellants argue the evidence at trial supports the existence of "[t]wo independent supply-side conspiracies." The two purportedly separate conspiracies they instance, however, each comprises the core conspiracy charged—that of Maynard, Jones, and the same co-conspirators, to possess and to distribute cocaine and cocaine base—differing only as to the supplier of the drugs, as reflected in the following illustration:

Appellants' view:
Two conspiracies



Government's view:
One conspiracy



Even if the evidence showed the charged conspiracy to distribute drugs relied upon two different suppliers, and the Government does not concede it did, that does not

cleave in two the single conspiracy to distribute the appellants were charged with operating. As the appellants offer no other reason to doubt the district court's conclusion, in rejecting the proposed instruction, that "[t]he defendants here and their coconspirators [were] involved in a single overarching conspiracy," there was no error in the district court's refusal to instruct the jury about multiple conspiracies.

E. Immunity

At trial, the appellants called a number of their coconspirators as witnesses, but the co- conspirators refused to testify, asserting their right, under the Fifth Amendment, not to be compelled to incriminate themselves. The appellants then asked the district court, "in its discretion, [to] adopt [the] rationale and . . . procedure" set forth in *Carter v. United States*, 684 A.2d 331 (1996), where the District of Columbia Court of Appeals addressed a situation in which

> a defense witness possessing material, exculpatory and non-cumulative evidence which is unobtainable from any other source will invoke the Fifth Amendment privilege against self-incrimination unless granted executive "use" immunity.

Id. at 342. In *Carter* the court held that if the Government did not "submit to the court a reasonable basis for not affording use immunity," then the court would dismiss the indictment. *Id.* at 343. The district court refused to follow *Carter*.

The appellants do not argue the district court's refusal to follow *Carter* violated any right they had under any source of law. The closest they come is to say "a

strong case can be made that [use immunity] is compelled . . . by due process considerations," but they do not make any effort to show this case presents the sort of "extraordinary circumstances" in which some courts have suggested the Government's failure to grant use immunity might violate the Due Process Clause of the Fifth Amendment, see, *e.g.*, *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (discussing three-part test used to determine whether failure of Government to grant immunity violates due process, including "prosecutorial overreaching"); *cf. United States v. Lugg*, 892 F.2d 101, 104 (D.C. Cir. 1989) (reserving due process issue: "[w]hatever it takes to constitute a deprivation of a fair trial by the prosecution's failure to exercise its broad discretion on immunity grants, the present case does not present it").

Instead, their counsel told the district court:

> I'll be straight. I'll be honest with the Court. I don't believe that there's any case law in this jurisdiction or another federal jurisdiction that would allow the Court to do this. . . . I think that the Court should, in its discretion, adopt [the rule in *Carter*].

The appellants mistake our role in asking us "to fashion[]" a rule of the sort the district court declined to adopt. Absent a well-founded claim they were deprived of due process, the only question they may properly raise is whether the district court abused its discretion, to which the answer is obviously no.

III. Analysis: Evidence Obtained from GPS Device

Jones argues his conviction should be overturned because the police violated the Fourth Amendment prohibi-

tion of "unreasonable searches" by tracking his movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep without a valid warrant.* We consider first whether that use of the device was a search and then, having concluded it was, consider whether it was reasonable and whether any error was harmless.

A. Was Use of GPS a Search?

For his part, Jones argues the use of the GPS device violated his "reasonable expectation of privacy," *United States v. Katz*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring), and was therefore a search subject to the reasonableness requirement of the Fourth Amendment. Of course, the Government agrees the *Katz* test applies here, but it argues we need not consider whether Jones's expectation of privacy was reasonable because that question was answered in *United States v. Knotts*, 460 U.S. 276 (1983), in which the Supreme Court held the use of a beeper device to aid in tracking a suspect to his drug lab was not a search. As explained below, we hold *Knotts* does not govern this case and the police action was a search because it defeated Jones's reasonable expectation of privacy. We then turn to the Government's claim

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* Although the Jeep was registered in the name of Jones's wife, the Government notes "Jones was the exclusive driver of the Jeep," and does not argue his non-ownership of the Jeep defeats Jones's standing to object. We see no reason it should. *See Rakas v. Illinois*, 439 U.S. 128, 148-49 & n.17 (1978) (whether defendant may challenge police action as search depends upon his legitimate expectation of privacy, not upon his legal relationship to the property searched). We therefore join the district court and the parties in referring to the Jeep as being Jones's. 451 F. Supp. 2d 71, 87 (2006).

our holding necessarily implicates prolonged visual surveillance.

1. *Knotts* is not controlling

The Government argues this case falls squarely within the holding in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. In that case the police had planted a beeper in a five-gallon container of chemicals before it was purchased by one of Knotts's co-conspirators; monitoring the progress of the car carrying the beeper, the police followed the container as it was driven from the "place of purchase, in Minneapolis, Minnesota, to [Knotts's] secluded cabin near Shell Lake, Wisconsin," 460 U.S. at 277, a trip of about 100 miles. Because the co-conspirator, by driving on public roads, "voluntarily conveyed to anyone who wanted to look" his progress and route, he could not reasonably expect privacy in "the fact of his final destination." *Id.* at 281.

The Court explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case. *Id.* at 283 (noting "limited use which the government made of the signals from this particular beeper"); *see also id.* at 284-85 ("nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the [container] had ended its automotive journey at rest on respondent's premises in rural Wisconsin"). Most important for the present case, the Court specifically reserved the question whether a war-

rant would be required in a case involving "twenty-four hour surveillance," stating

> if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.

Id. at 283-84.

Although the Government, focusing upon the term "dragnet," suggests *Knotts* reserved the Fourth Amendment question that would be raised by mass surveillance, not the question raised by prolonged surveillance of a single individual, that is not what happened. In reserving the "dragnet" question, the Court was not only addressing but in part actually quoting the defendant's argument that, if a warrant is not required, then prolonged "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision." *Id.* at 283.* The Court avoided the question

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* Indeed, the quoted section of the respondent's brief envisions a case remarkably similar to the one before us:

> We respectfully submit that the Court should remain mindful that should it adopt the result maintained by the government, twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision. Without the limitations imposed by the warrant requirement itself, and the terms of any warrant which is issued, any person or residence could be monitored at any time and for any length of time. Should a beeper be installed in a container of property which is not contraband, as here, it would enable authorities to determine a citizen's location at any time without knowing whether his travels are for legitimate or illegitimate purposes, should the container be moved. A beeper thus would turn a person into a broadcaster of his own affairs and travels, without his knowledge or consent, for as long as the government may wish to use him where no warrant places a limit on surveillance. To allow war-

whether prolonged "twenty-four hour surveillance" was a search by limiting its holding to the facts of the case before it, as to which it stated "the reality hardly suggests abuse." *Id.* at 283 (internal quotation marks deleted).

In short, *Knotts* held only that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *id.* at 281, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it. The Fifth Circuit likewise has recognized the limited scope of the holding in *Knotts*, *see United States v. Butts*, 729 F.2d 1514, 1518 n.4 (1984) ("'As did the Supreme Court in *Knotts*, we pretermit any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms"), as has the New York Court of Appeals, *see People v. Weaver*, 12 N.Y. 3d 433, 440–44 (2009) (*Knotts* involved a "single trip" and Court "pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if 'twenty-four hour surveillance of any citizen of this country [were] possible'"). *See also* Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 419 UCLA L. Rev. 409, 457 (2007) ("According to the [Supreme] Court, its decision [in *Knotts*] should not be read to sanction 'twenty-four hour surveillance of any

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rantless beeper monitoring, particularly under the standard urged by the government here ("reasonable suspicion"), would allow virtually limitless intrusion into the affairs of private citizens.

Br. of Resp. at 9-10 (No. 81-1802).

citizen of this country.'" (quoting *Knotts*, 460 U.S. at 284)).

Two circuits, relying upon *Knotts*, have held the use of a GPS tracking device to monitor an individual's movements in his vehicle over a prolonged period is not a search, *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), but in neither case did the appellant argue that *Knotts* by its terms does not control whether prolonged surveillance is a search, as Jones argues here. Indeed, in *Garcia* the appellant explicitly conceded the point. Br. of Appellant at 22 (No. 06-2741) ("Garcia does not contend that he has a reasonable expectation of privacy in the movements of his vehicle while equipped with the GPS tracking device as it made its way through public thoroughfares. *Knotts*. His challenge rests solely with whether the warrantless installation of the GPS device, in and of itself, violates the Fourth Amendment."). Thus prompted, the Seventh Circuit read *Knotts* as blessing all "tracking of a vehicle on public streets" and addressed only "whether installing the device in the vehicle converted the subsequent tracking into a search." *Garcia*, 474 F.3d at 996. The court viewed use of a GPS device as being more akin to hypothetical practices it assumed are not searches, such as tracking a car "by means of cameras mounted on lampposts or satellite imaging," than it is to practices the Supreme Court has held are searches, such as attaching a listening device to a person's phone. *Id.* at 997. For that reason it held installation of the GPS device was not a search. Similarly, the Ninth Circuit perceived no distinction between short- and long-term surveillance; it noted the appellant had "acknowledged" *Knotts* controlled the case and addressed only whether *Kyllo v. United States*,

533 U.S. 27 (2001), in which the Court held the use of a thermal imaging device to detect the temperature inside a home defeats the occupant's reasonable expectation of privacy, had "heavily modified the Fourth Amendment analysis." *Pineda-Moreno*, 591 F.3d at 1216.

In a third related case the Eighth Circuit held the use of a GPS device to track a truck used by a drug trafficking operation was not a search. *United States v. Marquez*, 605 F.3d 604 (2010). After holding the appellant had no standing to challenge the use of the GPS device, the court went on to state in the alternative:

> Even if Acosta had standing, we would find no error. . . . [W]hen police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

Id. at 609-10.

In each of these three cases the court expressly reserved the issue it seems to have thought the Supreme Court had reserved in *Knotts*, to wit, whether "wholesale" or "mass" electronic surveillance of many individuals requires a warrant. *Marquez*, 605 F.3d at 610; *Pineda-Moreno*, 591 F.3d at 1216 n.2; *Garcia*, 474 F.3d at 996. As we have explained, in *Knotts* the Court actually reserved the issue of prolonged surveillance. That issue is squarely presented in this case. Here the police used the GPS device not to track Jones's "movements from one place to another," *Knotts*, 460 U.S. at 281, but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discov-

ering the totality and pattern of his movements from place to place to place.

2. Were Jones's locations exposed to the public?

As the Supreme Court observed in *Kyllo*, the "*Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable." 533 U.S. at 34. Indeed, the Court has invoked various and varying considerations in applying the test. *See O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("We have no talisman that determines in all cases those privacy expectation that society is prepared to accept as reasonable") (O'Connor, J., plurality opinion); *Rakas v. Illinois*, 439 U.S. 128, 143 n.2 (1978) ("legitimation of expectations of privacy must have a source outside the Fourth Amendment," such as "understandings that are recognized or permitted by society"). This much is clear, however: Whether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been "expose[d] to the public," *Katz*, 389 U.S. at 351.

Two considerations persuade us the information the police discovered in this case—the totality of Jones's movements over the course of a month—was not exposed to the public: First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed *constructively* even though each individual movement is exposed, because that whole

reveals more—sometimes a great deal more—than does the sum of its parts.

a. Actually exposed?

The holding in *Knotts* flowed naturally from the reasoning in *Katz:* "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," 389 U.S. at 351. *See Knotts*, 460 U.S. at 281-82 (movements observed by police were "voluntarily conveyed to anyone who wanted to look"). The Government argues the same reasoning applies here as well. We first consider the precedent governing our analysis of whether the subject of a purported search has been exposed to the public, then hold the information the police discovered using the GPS device was not so exposed.

(i). Precedent

The Government argues Jones's movements over the course of a month were actually exposed to the public because the police lawfully could have followed Jones everywhere he went on public roads over the course of a month. The Government implicitly poses the wrong question, however.

In considering whether something is "exposed" to the public as that term was used in *Katz* we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do. *See California v. Greenwood*, 486 U.S. 35, 40 (1988) ("It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public"); *California v. Ciraolo*, 476 U.S. 207, 213, 214 (1986) ("in an age where private and

commercial flight in the public airways is routine," defendant did not have a reasonable expectation of privacy in location that "[a]ny member of the public flying in this airspace who glanced down could have seen"); *Florida v. Riley*, 488 U.S. 445, 450 (1989) ("Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, 'private and commercial flight [by helicopter] in the public airways is routine' in this country, and there is no indication that such flights are unheard of in Pasco County, Florida" (quoting *Ciraolo*)). Indeed, in *Riley*, Justice O'Connor, whose concurrence was necessary to the judgment, pointed out:

> Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part, of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude.
>
> . . . .
>
> If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view.

488 U.S. at 453, 455; *see also id.* at 467 (Blackmun, J., dissenting) (explaining five justices agreed "the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet").

The Supreme Court re-affirmed this approach in *Bond v. United States*, 529 U.S. 334 (2000). There a pas-

senger on a bus traveling to Arkansas from California had placed his soft luggage in the overhead storage area above his seat. During a routine stop at an off-border immigration checkpoint in Sierra Blanca, Texas, a Border Patrol agent squeezed the luggage in order to determine whether it contained drugs and thus detected a brick of what turned out to be methamphetamine. The defendant argued the agent had defeated his reasonable expectation of privacy, and the Government argued his expectation his bag would not be squeezed was unreasonable because he had exposed it to the public. The Court responded:

> [A] bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

Id. at 338-39. The Court focused not upon what other passengers could have done or what a bus company employee might have done, but rather upon what a reasonable bus passenger expects others he may encounter, i.e., fellow passengers or bus company employees, might actually do. A similar focus can be seen in *Kyllo*, in which the Court held use of a thermal imaging device defeats the subject's reasonable expectation of privacy, "at least where . . . the technology in question is not in general public use." 533 U.S. at 34.

The Government cites as authority to the contrary our statement in *United States v. Gbemisola*, 225 F.3d 753, 759 (2000), that "[t]he decisive issue . . . is not

what the officers saw but what they could have seen." When read in context, however, this snippet too supports the view that whether something is "expose[d] to the public," *Katz*, 389 U.S. at 351, depends not upon the theoretical possibility, but upon the actual likelihood, of discovery by a stranger:

> The decisive issue . . . is not what the officers saw but what they could have seen. At any time, the surveillance vehicle could have pulled alongside of the taxi and the officers could have watched Gbemisola through its window. Indeed, the taxi driver himself could have seen the event simply by looking in his rear-view mirror or turning around. As one cannot have a reasonable expectation of privacy concerning an act performed within the visual range of a complete stranger, the Fourth Amendment's warrant requirement was not implicated.

225 F.3d at 759. In short, it was not at all unlikely Gbemisola would be observed opening a package while seated in the rear of a taxi, in plain view of the driver and perhaps of others.

(ii). Application

Applying the foregoing analysis to the present facts, we hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the

next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

b. Constructively exposed?

The Government does not separately raise, but we would be remiss if we did not address, the possibility that although the whole of Jones's movements during the month for which the police monitored him was not actually exposed to the public, it was constructively exposed because each of his individual movements during that time was itself in public view. When it comes to privacy, however, precedent suggests that the whole may be more revealing than the parts. Applying that precedent to the circumstances of this case, we hold the information the police discovered using the GPS device was not constructively exposed.

(i). Precedent

The Supreme Court addressed the distinction between a whole and the sum of its parts in *United States Department of Justice v. National Reporters Committee*, 489 U.S. 749 (1989), which arose not under the Fourth Amendment but under the Freedom of Information Act, 5 U.S.C. § 552. There the respondents had requested, pursuant to the FOIA, that the FBI disclose rap sheets compiling the criminal records of certain named persons. Although the "individual events in those summaries [were] matters of public record," the Court upheld the FBI's invocation of the privacy exception to the FOIA, holding the subjects had a privacy interest in the aggregated "whole" distinct from their interest in the "bits of

information" of which it was composed. *Id.* at 764.* Most relevant to the Fourth Amendment, the Court said disclosure of a person's rap sheet "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.*

The Court implicitly recognized the distinction between the whole and the sum of the parts in the Fourth Amendment case of *Smith v. Maryland*, 442 U.S. 735 (1979). There, in holding the use of a pen register to record all the numbers dialed from a person's phone was not a search, the Court considered not just whether a reasonable person expects any given number he dials to be exposed to the phone company but also whether he expects all the numbers he dials to be compiled in a list. *Id.* at 742-43 ("subscribers realize . . . the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills"; they "typically know that . . . the phone company has facilities for recording" the numbers they dial). The Court explained that Smith could not reasonably expect privacy in the list of numbers because that list was composed of information that he had "voluntarily conveyed to [the company]" and that "it had facilities for recording and . . . was free to record." *Id.* at 745.

If, for the purposes of the Fourth Amendment, the privacy interest in a whole could be no greater (or no

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* The colloquialism that "the whole is greater than the sum of its parts" is not quite correct. "It is more correct to say that the whole is something different than the sum of its parts." Kurt Koffka, Principles of Gestalt Psychology 176 (1935). That is what the Court was saying in *Reporters Committee* and what we mean to convey throughout this opinion.

different) than the privacy interest in its constituent parts, then the Supreme Court would have had no reason to consider at length whether Smith could have a reasonable expectation of privacy in the list of numbers he had called. Indeed, Justice Stewart dissented specifically because he thought the difference was significant on the facts of that case. *See id.* at 747 ("such a list [of all the telephone numbers one called] easily could reveal . . . the most intimate details of a person's life").

(ii). Application

The whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more.

As with the "mosaic theory" often invoked by the Government in cases involving national security information, "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene." *CIA v. Sims*, 471 U.S. 159, 178 (1985) (internal quotation marks deleted); *see J. Roderick MacArthur Found. v. F.B.I.*, 102 F.3d 600, 604 (D.C. Cir. 1996). Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or

a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story.* A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

Other courts have recognized prolonged surveillance of a person's movements may reveal an intimate picture of his life. *See Galella v. Onassis*, 353 E Supp. 196, 227-28 (S.D.N.Y. 1972) ("Plaintiff's endless snooping constitutes tortious invasion of privacy. . . . [he] has insinu-

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* This case itself illustrates how the sequence of a person's movements may reveal more than the individual movements of which it is composed. Having tracked Jones's movements for a month, the Government used the resulting pattern—not just the location of a particular "stash house" or Jones's movements on any one trip or even day—as evidence of Jones's involvement in the cocaine trafficking business. The pattern the Government would document with the GPS data was central to its presentation of the case, as the prosecutor made clear in his opening statement:

> [T]he agents and investigators obtained an additional order and that was to install a GPS. . . . They had to figure out where is he going? When he says ten minutes, where is he going? Again, the pattern developed. . . . And I want to . . . just show you an example of how the pattern worked. . . . The meetings are short. But you will again notice the pattern you will see in the coming weeks over and over again.

Tr. 11/15/07.

ated himself into the very fabric of Mrs. Onassis' life") *(aff'd in relevant part* 487 F.2d 986, 994 & n.12 (2nd Cir. 1973) (if required to reach privacy issue "would be inclined to agree with" district court's treatment)). Indeed, they have reached that conclusion in cases involving prolonged GPS monitoring. *See People v. Weaver*, 909 N.E. 2d 1194, 1199 (N.Y. 2009) (Prolonged GPS monitoring "yields . . . a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits"); *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (en banc) ("In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life.").

A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain "disconnected and anonymous," *Nader v. Gen. Motors Corp.*, 25 N.Y.2d 560, 572 (1970) (Breitel, J., concurring). In this way the extended recordation of a person's movements is, like the "manipulation of a bus passenger's carry-on" canvas bag in *Bond*, not what we expect anyone to do, and it reveals more than we expect anyone to know. 529 U.S. at 339.

3. Was Jones's expectation of privacy reasonable?

It does not apodictically follow that, because the aggregation of Jones's movements over the course of a

month was not exposed to the public, his expectation of privacy in those movements was reasonable; "legitimation of expectations of privacy must have a source outside the Fourth Amendment," such as "understandings that are recognized or permitted by society," *United States v. Jacobsen*, 466 U.S. 109, 123 n.22 (1984) (quoting *Rakas*, 439 U.S. at 143 n.12). So it is that, because the "Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate," "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* at 123.

The Government suggests Jones's expectation of privacy in his movements was unreasonable because those movements took place in his vehicle, on a public way, rather than inside his home. That the police tracked Jones's movements in his Jeep rather than in his home is certainly relevant to the reasonableness of his expectation of privacy; "in the sanctity of the home," the Court has observed, "*all* details are intimate details," *Kyllo*, 533 U.S. at 37. A person does not leave his privacy behind when he walks out his front door, however. On the contrary, in *Katz* the Court clearly stated "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351. Or, as this court has said, outside the home, the "Fourth Amendment . . . secur[es] for each individual a private enclave, a 'zone' bounded by the individual's own reasonable expectations of privacy." *Reporters Comm. for Freedom of Press v. AT&T*, 593 F.2d 1030, 1042-43 (1978).

Application of the test in *Katz* and its sequellae to the facts of this case can lead to only one conclusion: Society

recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*; indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under *Katz*, such as a urine test, *see Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (urine test could "reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic"); use of an electronic listening device to tap a payphone, *Katz*, 389 U.S. at 352 (user of telephone booth "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world"); inspection of a traveler's luggage, *Bond*, 529 U.S. at 338 ("travelers are particularly concerned about their carry-on luggage"); or use of a thermal imaging device to discover the temperature inside a home, *Kyllo*, 533 U.S. at 37 ("In the home, *all* details are intimate details").

We note without surprise, therefore, that the Legislature of California, in making it unlawful for anyone but a law enforcement agency to "use an electronic tracking device to determine the location or movement of a person," specifically declared "electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy," and implicitly but necessarily thereby required a warrant for police use of a GPS, California Penal Code section 637.7,

Stats. 1998 c. 449 (S.B. 1667) § 2. Several other states have enacted legislation imposing civil and criminal penalties for the use of electronic tracking devices and expressly requiring exclusion of evidence produced by such a device unless obtained by the police acting pursuant to a warrant. *See, e.g.*, Utah Code Ann. §§ 77-23a-4, 77-23a-7, 77-23a- 15.5; Minn Stat §§ 626A.37, 626A.35; Fla Stat §§ 934.06, 934.42; S.C. Code Ann § 17-30- 140; Okla. Stat, tit 13, §§ 176.6, 177.6; Haw. Rev. Stat §§ 803-42, 803-44.7; 18 Pa. Cons. Stat § 5761.

Although perhaps not conclusive evidence of nationwide "societal understandings," *Jacobsen*, 466 U.S. at 123 n.22, these state laws are indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable. So, too, are the considered judgments of every court to which the issue has been squarely presented. *See Weaver*, 12 N.Y.3d at 447 ("the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause"); *Jackson*, 76 P.3d at 223-24 (under art. I, § 7 of Washington State Constitution, which "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass," "use of a GPS device on a private vehicle involves a search and seizure"); *cf. Commonwealth v. Connolly*, 913 N.E.2d 356, 369-70 (Ma. 2009) (installation held a seizure). The federal circuits that have held use of a GPS device is not a search were not alert to the distinction drawn in *Knotts* between short-term and prolonged surveillance,* but we have al-

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* One federal district court and two state courts have also held use of a GPS device is not *per se* a search, but none was presented with the argument that prolonged use of a GPS device to back an individual's

ready explained our disagreement on that collateral point.

4. Visual surveillance distinguished

The Government would have us abjure this conclusion on the ground that "[Jones's] argument logically would prohibit even visual surveillance of persons or vehicles located in public places and exposed to public view, which clearly is not the law." We have already explained why Jones's argument does not "logically . . . prohibit" much visual surveillance: Surveillance that reveals only what is already exposed to the public—such as a person's movements during a single journey—is not a search. *See Knotts*, 460 U.S. at 285.

Regarding visual surveillance so prolonged it reveals information not exposed to the public, we note preliminarily that the Government points to not a single actual example of visual surveillance that will be affected by our holding the use of the GPS in this case was a search. No doubt the reason is that practical considerations prevent

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movements is meaningfully different from short-term surveillance. *See United States v. Moran*, 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005) (police used GPS device to track defendant during one-day drive from Arizona to New York); *State v. Sveum*, 269 N.W.2d 53, 59 (Wis. Ct. App. 2009) ("Sveum implicitly concedes that . . . using [a GPS device] to monitor *public* travel does not implicate the Fourth Amendment. He contends, however, that because the GPS device permitted the police to monitor the location of his car while it was in his garage . . . all of the information obtained from the GPS device should have been suppressed."); *Stone v. State*, 941 A.2d 1238 (Md. 2008) (holding, in light of *Knotts*, that lower court "did not abuse its discretion in cutting short testimony" about use of GPS device; appellant did not cite *Knotts* in is briefs or affirmatively argue use of device was a search).

visual surveillance from lasting very long.* Continuous human surveillance for a week would require all the time and expense of several police officers, while comparable photographic surveillance would require a net of video cameras so dense and so widespread as to catch a person's every movement, plus the manpower to piece the photographs together. Of course, as this case and some of the GPS cases in other courts illustrate, *e.g.*, *Weaver*, 12 N.Y.3d at 447, 459 (holding use of GPS device to track suspect for 65 days was search); *Jackson*, 76 P.3d 261-62 (holding use of GPS device to track suspect for two and one half weeks was search), prolonged GPS monitoring is not similarly constrained. On the contrary, the marginal cost of an additional day—or week, or month—of GPS monitoring is effectively zero. Nor, apparently, is the fixed cost of installing a GPS device significant; the Los Angeles Police Department can now affix a GPS device to a passing car simply by launching a GPS-enabled dart.* For these practical reasons, and not by virtue of

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* According to the former Chief of the LAPD, keeping a suspect under "constant and close surveillance" is "not only more costly than any police department can afford, but in the vast majority of cases it is impossible." W.H. Parker, *Surveillance by Wiretap or Dictograph: Threat or Protection?*, 42 Cal. L. Rev. 727, 734 (1954). Or as one of the Special Agents involved in the investigation of Jones testified at trial: "Physical surveillance is actually hard, you know. There's always chances of getting spotted, you know, the same vehicle always around, so we decided to use GPS technology." Tr. 11/21/07 at 114.

* "The darts consist of a miniaturized GPS receiver, radio transmitter, and battery embedded in a sticky compound material. When fired at a vehicle, the compound adheres to the target, and thereafter permits remote real-time tracking of the target from police headquarters." Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. Rev. 409, 419 (2007); *see also* Richard Winton, *LAPD Pursues High-Tech End to High-Speed Chases*,

its sophistication or novelty, the advent of GPS technology has occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave.

The Government's argument—that our holding the use of the GPS device was a search necessarily implicates prolonged visual surveillance—fails even on its own terms. That argument relies implicitly upon an assumption rejected explicitly in *Kyllo*, to wit, that the means used to uncover private information play no role in determining whether a police action frustrates a person's reasonable expectation of privacy; when it comes to the Fourth Amendment, means do matter. *See* 533 U.S. at 35 n.2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment"). For example, the police may without a warrant record one's conversations by planting an undercover agent in one's midst, *Lopez v. United States*, 373 U.S. 427, 429 (1963), but may not do the same by wiretapping one's phone, even "without any trespass," *Katz*, 389 U.S. 347, 353 (1967). Quite simply, in the former case one's reasonable expectation of control over one's personal information would not be defeated; in the latter it would be. See *Reporters Committee*, 489 U.S. at 763 ("both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person").

This case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the war-

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L.A. Times, Feb. 3, 2006, at B1. GPS darts are used in exigent circumstances and for only as long as it takes to interdict the subject driver without having to engage in a high-speed chase on a public way.

rant requirement of the Fourth Amendment. As the Supreme Court said in *Dow Chemical Co. v. United States*, "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. 'We have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.'" 476 U.S. 227, 238 n.5 (1986) (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984)); *see also City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) ("Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations"). By the same token, we refuse to hold this "search is not a search," *Kyllo*, 533 U.S. at 32, merely because a contrary holding might at first blush seem to implicate a different but intuitively permissible practice. *See Nat'l Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987) ("Few legal issues in the Fourth Amendment domain are so pure that they do not turn on *any* facts or circumstances peculiar to the case"). Instead, just as the Supreme Court in *Knotts* reserved the lawfulness of prolonged beeper surveillance, we reserve the lawfulness of prolonged visual surveillance.

B. Was the Search Reasonable Nonetheless?

A search conducted without a warrant is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Here, because the police installed the GPS device on Jones's vehicle without a valid warrant,* the Government argues the resulting

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* The police had obtained a warrant to install the GPS device in D.C. only, but it had expired before they installed it—which they did in

search can be upheld as a reasonable application of the automobile exception to the warrant requirement. Under that exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

As Jones points out, this arguinent is doubly off the mark. First, the Government did not raise it below. *See Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008) (argument not made in district court is forfeited). Second, the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate. *See Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered his automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed").

C. Was the Error Harmless?

Finally, the Government argues in a terse and conclusory few lines that the district court's error in admitting evidence obtained by use of the GPS device was harmless. "The beneficiary of a constitutional error [must prove] beyond a reasonable doubt that the error

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Maryland. When challenged in the district court, the Government "conceded . . . the violations" of the court's order, "confine[d] its arguments to the issue of whether or not a court order was required[,] and assert[ed] that it was not." Government's Omnibus Response to Defendant's Legal Motions.

complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

According to the Government, "Overwhelming evidence implicated [Jones] in the drug-distribution conspiracy." Overwhelming evidence certainly showed there was a conspiracy to distribute and to possess with intent to distribute drugs based out of 9508 Potomac Drive, Ft. Washington, Maryland, where police found $850,000 in cash, 97 kilograms of cocaine, and one kilogram of cocaine base. The evidence linking Jones to that conspiracy, however, was not strong, let alone overwhelming.

The Government points to no evidence of a drug transaction in which Jones was involved, nor any evidence that Jones ever possessed any drugs. Instead it relies upon (1) the testimony of admitted participants in the conspiracy, one of whom (Bermea) was at the Potomac Drive house when the police arrived—to the effect that Jones was the ringleader of the operation and frequented the Potomac Drive house, (2) data showing Jones used his cell-phone frequently and often called some of the conspirators, including one whose phone was found at the Potomac Drive house, (3) leases in Jones's name for other properties the Government alleged were used in furtherance of the conspiracy, (4) currency seized from Jones's Jeep and mini-van, and (5) physical and photographic surveillance showing Jones visited the Potomac Drive house a few times. Jones's defense responded to each type of evidence as follows: (1) the cooperating witnesses had cut deals with the Government and were not credible, (2) the cell-phone records and (5) visits to Potomac Drive showed only that Jones knew the participants in the conspiracy, (3) Jones leased the other

properties for legitimate purposes and no drugs were found there, (4) and his nightclub was a cash business.

The GPS data were essential to the Government's case. By combining them with Jones's cell-phone records the Government was able to paint a picture of Jones's movements that made credible the allegation that he was involved in drug trafficking. In his closing statement the Government attorney summarized this way the inference he was asking the jury to draw:

> [W]hen there is a conversation with Bermea and [Jones] says, I'm coming to see you, or I'll be there in ten minutes, and within a while . . . the GPS shows that that vehicle is in Potomac Drive, how does that all fit together? Well it fits together exactly as you know. That the defendant is going to 9508 Potomac Drive, and there's no reason anyone goes there other than drug activity.
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> . . . .
>
> Then, that follows these series of conversations, day after day, GPS reading after GPS reading, with the defendant speaking with [Bermea] and then the vehicle coming to Potomac Drive. . . . You'll have the timeline. You've got the conversations. I won't go through them all."

Tr. 1/3/08 at 114-18. As mentioned earlier, the Government had also stressed in its opening remarks, which would color the jury's understanding of the whole case, that the GPS data would demonstrate Jones's involvement in the conspiracy.

To be sure, absent the GPS data a jury reasonably might have inferred Jones was involved in the conspiracy. "We are not concerned here," however, "with whether there was sufficient evidence on which [Jones] could have been convicted without the evidence complained of"; rather our concern is with "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). Without the GPS data the evidence that Jones was actually involved in the conspiracy is so far from "overwhelming" that we are constrained to hold the Government has not carried its burden of showing the error was harmless beyond a reasonable doubt.

IV. Conclusion

Maynard's conviction and sentence are affirmed because neither any of the appellants' joint arguments nor Maynard's individual argument warrants reversal. Jones's conviction is reversed because it was obtained with evidence procured in violation of the Fourth Amendment.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3034, Consolidated with No. 08-3030

UNITED STATES OF AMERICA, APPELLEE

v.

ANTOINE JONES, APPELLANT

Filed: Nov. 19, 2010

ORDER

Before: SENTELLE, Chief Judge, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges

Appellee's petition for rehearing en banc in No. 08-3034, and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MICHAEL C. MCGRAIL
Deputy Clerk

GINSBURG, TATEL and GRIFFITH, *Circuit Judges*, concurring in the denial of rehearing en banc: In response to the Government's petition, we underline two matters. First, because the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful; to the extent the Government invoked the automobile exception to the warrant requirement, as we pointed out, that exception applies only when "a car is readily mobile and probable cause exists to believe it contains contraband," neither of which elements the Government satisfied. Slip op. at 38 (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)). Second, the Government's petition complains that the court's opinion "implicitly calls into question common and important practices such as sustained visual surveillance and photographic surveillance of public places," Pet. at 2, but that is not correct. The court explicitly noted: "This case does not require us to, and therefore we do not decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment." Slip op. at 37.

SENTELLE, *Chief Judge*, joined by HENDERSON, BROWN, and KAVANAUGH, *Circuit Judges*, dissenting from the denial of rehearing en banc: The panel opinion in this case held that the government's warrantless use of a global positioning system ("GPS") device to track the public movements of appellant Antoine Jones's vehicle for approximately four weeks was an unreasonable search in violation of Jones's Fourth Amendment rights. In my view, this question should be reviewed by the court en banc because the panel's decision is inconsistent not only with every other federal circuit which has considered the case, but more importantly, with controlling Supreme Court precedent set forth in *United States v. Knotts*, 460 U.S. 276 (1983).

In *Knotts*, the Supreme Court reviewed a case in which law enforcement officers had placed a radio transmitter ("beeper") inside a chloroform container which was in turn placed inside a motor vehicle. Through the use of the electronic signals from the beeper, the police tracked the chloroform container from one automobile to another across the length of an interstate journey from Minneapolis, Minnesota, to Shell Lake, Wisconsin. The information obtained from the electronic monitoring was augmented by intermittent physical surveillance and by monitoring from a helicopter. In upholding the constitutionality of the surveillance by electronic monitoring, the Supreme Court reviewed the establishment of the privacy interest as the principal right protected by the Fourth Amendment's guarantee. To briefly summarize the Court's jurisprudence from *Knotts* and its predecessors: if there is no invasion of a reasonable expectation of privacy, there is no violation of the Fourth Amendment protection "against unreasonable searches and seizures." U.S. CONST. AMENDMENT IV.

Applying that jurisprudence to the electronically enhanced surveillance in *Knotts*, the Court declared that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. The Court went on to note that "[w]hen [the suspect] traveled over the public streets, he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property." *Id.* at 281-82. The Court further reasoned that since visual surveillance from public places along the route or adjacent to the destination would have revealed all of the same information to the police, "[t]he fact that the officers . . . relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [the suspect's] automobile to the police receiver, does not alter the situation." *Id.* at 282. Central to the *Knotts* Court's reasoning, and, I think, controlling in this case is the observation that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Id.*

Everything the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy. There is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking the *Jones* appellant with a GPS. The panel opinion distinguishes *Knotts*—I think unconvincingly—not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case than in

Knotts. The panel asserts that "the totality of Jones's movements over the course of a month . . . was not exposed to the public." The panel reasoned that "first, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all these movements is effectively nil." Slip op. at 22. I suggest that this assertion in no way demonstrates that Jones's movements were not exposed to the public. The fact that no particular individual sees them all does not make the movements any less public. Nor is it evident at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private. As the *Knotts* Court recalled, it is well established that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). In applying that principle in *Knotts*, the Supreme Court declared that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281.

The panel opinion seems to recognize that Jones had no reasonable expectation of privacy in any particular datum revealed by the GPS-augmented surveillance, but somehow acquired one through "the totality of Jones's movements over the course of a month." Slip op. at 22. In the view of the panel, this is true "because that whole reveals more . . . than does the sum of its parts." While this may be true, it is not evident how it affects the reasonable expectation of privacy by Jones. The reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero. The sum

of an infinite number of zero-value parts is also zero. Nowhere in *Knotts* or any other Supreme Court Fourth Amendment decision since the adoption of the expectation of privacy rationale in *Katz* has the Court ever suggested that the test of the reasonable expectation is in any way related to the intent of the user of the data obtained by the surveillance or other alleged search. The words "reasonable expectation of privacy" themselves suggest no such element. The expectation of privacy is on the part of the observed, not the observer. Granted, the degree of invasion of that expectation may be measured by the invader's intent, but an invasion does not occur unless there is such a reasonable expectation.

Lest the importance of this opinion be underestimated, I would note that the invasion the panel found was not in the use of the GPS device, but in the aggregation of the information obtained. Presumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem. Therefore, it would appear, as appellee argues, that this novel aggregation approach to the reasonable expectation of privacy would prohibit not only GPS- augmented surveillance, but any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel. True, the panel declares that "this case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment." Even in the face of this declaration, I cannot discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented

surveillance and a purely visual surveillance of substantial length.

I would further note that the Seventh Circuit in *United States v. Garcia*, 474 F.3d 994 (7th Cir.), *cert. denied*, 128 S. Ct. 291 (2007), concluded that "GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking." *Id.* at 997; *see also United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

In light of its inconsistency with Supreme Court jurisprudence and with the application of the Fourth Amendment to similar circumstances by other circuits, this decision warrants en banc consideration. I respectfully dissent from the denial.

KAVANAUGH, *Circuit Judge*, dissenting from the denial of rehearing en banc: I agree with Chief Judge Sentelle that the panel opinion conflicts with the Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276 (1983). I also share Chief Judge Sentelle's concern about the panel opinion's novel aggregation approach to Fourth Amendment analysis.

That is not to say, however, that I think the Government necessarily would prevail in this case. The defendant contended that the Fourth Amendment was violated not only by the police surveillance without a warrant (the issue addressed in the panel opinion) but also by the police's initial installation of the GPS device on his car without a warrant. The panel opinion did not address the defendant's alternative and narrower property-based

Fourth Amendment argument concerning the installation. In my judgment, the defendant's alternative submission also poses an important question and deserves careful consideration by the en banc Court.

The Supreme Court has stated that the Fourth Amendment "protects property as well as privacy." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). As the defendant here rightly points out, the police not only engaged in surveillance by GPS but also intruded (albeit briefly and slightly) on the defendant's personal property, namely his car, to install the GPS device on the vehicle.

Because of the police's physical intrusion to install the GPS device, this case raises an issue that was not presented in *Knotts*. The defendant in *Knotts* did not own the property in which the beeper was installed and thus did not have standing to raise any Fourth Amendment challenge to the installation of the beeper. But Justice Brennan's concurring opinion in *Knotts* foresaw the Fourth Amendment issue posed by the police's installing such a device: "when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." 460 U.S. at 286.

As Justice Brennan noted in *Knotts*, the Supreme Court precedent that is perhaps most relevant to this property-based argument is the Court's unanimous 1961 decision in *Silverman v. United States*, 365 U.S. 505. In Silverman, the Court concluded that installation of a listening device on the defendants' property (by accessing a heating duct in a shared wall of the defendants' row

house) was subject to the Fourth Amendment. The Court reasoned that the Fourth Amendment applied because of the police's physical contact with the defendants' property, which the Court variously characterized as: "unauthorized physical penetration into the premises," "unauthorized physical encroachment within a constitutionally protected area," "usurping part of the petitioners' house or office," "actual intrusion into a constitutionally protected area," and "physically entrench[ing] into a man's office or home." *Id.* at 509-12. The Court further determined that a physical encroachment on such an area triggered Fourth Amendment protection regardless of the precise details of state or local trespass law. *Id.* at 511.

To be sure, since *Silverman* the Supreme Court has held that the Fourth Amendment protects more than just property interests. *See Katz v. United States*, 389 U.S. 347, 352-53 (1967). But as thoroughly explained in *Soldal*, the Court has not retreated from the principle that the Fourth Amendment also protects property interests. 506 U.S. at 64. "'[P]rotection for property under the Fourth Amendment' remains a major theme of the post-*Katz* era: If a person owns property or has a close relationship to the owner, access to that property usually violates his reasonable expectation of privacy." Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516 (2007) (quoting *Soldal*, 506 U.S. at 64); *see also Bond v. United States*, 529 U.S. 334 (2000) (squeezing outer surface of a bag subject to Fourth Amendment).

If *Silverman* is still good law, and I see no indication that it is not, then *Silverman* may be relevant to the defendant's alternative argument concerning the police's

installation of the GPS device. Cars are "effects" under the text of the Fourth Amendment, *see United States v. Chadwick*, 433 U.S. 1, 12 (1977), and are thus "constitutionally protected areas" for purposes of *Silverman*.

The key *Silverman*-based question, therefore, is whether the police's installation of a GPS device on one's car is an "unauthorized physical encroachment within a constitutionally protected area" in the same way as installation of a listening device on a heating duct in a shared wall of a row house. *Silverman*, 365 U.S. at 510. One circuit judge has concluded that the Fourth Amendment does apply to installation of a GPS device: Absent the police's compliance with Fourth Amendment requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Kleinfeld, J., concurring). Without full briefing and argument, I do not yet know whether I agree with that conclusion. Whether the police's mere touching or manipulating of the outside of one's car is a "physical encroachment within a constitutionally protected area" requires fuller deliberation.* In any event, it is an important and close question, one that the en banc Court should consider along with the separate issue raised by Chief Judge Sentelle.

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* To be clear, even if the Fourth Amendment applies to the installation, the police may still attach GPS devices to suspects' cars. The police simply must first obtain a warrant or otherwise demonstrate that their actions are reasonable under the Fourth Amendment. Indeed, in this case, the police obtained a warrant but then failed to comply with the warrant's temporal and geographic limits.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 05-0386 (ESH)

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANT

Aug. 10, 2006

MEMORANDUM OPINION

HUVELLE, District Judge.

Before the Court are a series of motions, filed by Defendant Jones, to suppress evidence found in vehicles and at Levels nightclub, evidence obtained from a mobile tracking device, from the seizure of electronic communications, and from the interception of wire communications. Defendant also seeks discovery regarding co-conspirator statements, a preliminary determination of the conspiracy and a pretrial ruling on the admissibility of co-conspirator statements.[1]

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[1] Also pending before the Court is the government's Rule 404(b) motion and Defendant Jones' motions for a bill of particulars and for disclosure of confidential informants. The Court will address these motions at the hearing on Monday, August 14, 2006.

BACKGROUND

Defendants Antoine Jones, Adrian Jackson, Michael Huggins, Kevin Holland and Kirk Carter are charged in a 34-count Superseding Indictment (the "Indictment"). All defendants are charged with Conspiracy to Distribute and Possess with Intent to Distribute 5 Kilograms or more of Cocaine and 50 Grams or More of Cocaine Base, in violation of 21 U.S.C. § 846 (Count One), and with various individual counts of Use of a Communication Facility to Facilitate a Drug Trafficking Offense, in violation of 21 U.S.C. § 843(b) (Counts Five through Thirty-Four). In addition, Jones is charged with two counts of Unlawful Possession with Intent to Distribute Cocaine or Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii) (Count Two), and 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count Three), and Jackson is charged with Using, Carrying, Brandishing, and Possessing a Firearm During a Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Four).

As alleged in the Indictment, from at least sometime in 2003 through October 24, 2004, defendants and their co-conspirators acquired, repackaged, stored, processed, sold, and redistributed large quantities of cocaine and cocaine base, in the District of Columbia, the States of Maryland and Texas, the Republic of Mexico and elsewhere. It is further alleged that Jones was the primary supplier of cocaine and cocaine base to members of the organization in the District of Columbia and in the State of Maryland.

As part of their investigation into the alleged conspiracy, law enforcement agents utilized a number of investigative techniques, including surveillance, informants, installation of an electronic tracking device on Jones' vehi-

cle, search warrants issued to electronic communication service providers for text messages to or from cellular telephones used by Jones and an alleged co-conspirator, and a Title III wire intercept. The covert portion of the investigation ended on October 24, 2005, with searches pursuant to warrants and arrests. At that time, drugs, drug paraphernalia, firearms, and significant quantities of cash were seized from the homes of a number of the defendants, as well as from an alleged "stash house" in Fort Washington, Maryland where 97 kilograms of cocaine, 3 kilograms of crack cocaine, and in excess of $800,000 was found. (Government's Omnibus Response to Defendant's Legal Motions ["Gov't's Omnibus Opp'n"] at 5.) The evidence the government intends to introduce at trial includes, *inter alia*, items seized on October 24, 2005, a number of conversations intercepted pursuant to Title III wiretap orders, and the testimony of individuals who were allegedly part of Jones' drug organization.[2] (*See id.*)

I. Motion to Suppress Evidence Obtained From Interception of Wire Communications and Seizure of Electronic Communications

Jones first moves to suppress evidence obtained from the interception of wire communications (telephone conversations) to or from his cellular telephone and the seizure of electronic communications (text messages) to or from both his cellular telephone and the cellular telephone of an alleged co-conspirator Lawrence Maynard. (*See* Defendant's Motion to Suppress Evidence Obtained From Interception of Wire Communications and Seizure

[2] On June 5, 2006, the government filed a 21-page itemization of evidence, divided into nine categories, that it intends to rely on at trial.

of Electronic Communications ["Def.'s Mot. to Suppress Evid."].) The text messages were held in storage by two electronic communication service providers at the time of their acquisition by the government. In support of his motion, Jones argues that (1) the affidavits submitted by FBI Special Agent Stephanie Yanta in support of the text message search warrants and the wire intercept violated both the probable cause and necessity requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Wiretap Act"), 18 U.S.C. § 2510 *et seq.*; (2) Special Agent Yanta intentionally misled the authorizing court and demonstrated a reckless disregard for the truth in setting forth the factual allegations in her supporting affidavits; and (3) the government impermissibly failed to minimize the intercepted wire communications. In connection with his claim that the affidavits contained deliberate, material misstatements, Jones also seeks a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed.2d 667 (1978).[3] For the reasons explained herein, all of Jones' arguments are without merit.

A. The Text Message Affidavits

On August 10, 2005, and again on August 18, 2005, Magistrate Judge Alan Kay issued search warrants to two electronic communication service providers for stored text messages that had been transmitted over cellular telephones used by Jones and Maynard. In support of the search warrants, the government submitted

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[3] Jones also requests a *Franks* hearing in connection with his motions to suppress tangible evidence obtained from his Jeep Cherokee, evidence obtained from a mobile tracking device, and evidence seized at the Levels nightclub. These claims are addressed herein *infra*.

affidavits sworn to by Special Agent Yanta (the "August 10th Affidavit" and the "August 18th Affidavit"). In response to the search warrants, the companies provided a significant number of text messages to the government, which, in turn, referenced several of the messages in the affidavit in support of the first wiretap. (*See* Gov't's Omnibus Opp'n at 7.)

1. *Governing Law*

Jones' argument that the affidavits submitted in support of the text message search warrants violated certain requirements of the Wiretap Act fails as a matter of law because the Wiretap Act does not apply to the government's acquisition of text messages held in storage at electronic communication service providers. First, as amended by Title I of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Title I, 100 Stat. 1848 (Oct. 21, 1986), the Wiretap Act applies only to the "interception" of wire, oral or electronic communications. An "intercept" is defined in the Wiretap Act as "the aural or other acquisition of the contents of any wire, electronic, or oral communication *though the use of any electronic, mechanical or other device.*" *Id.* § 2510(4) (emphasis added). The text messages here were supplied to the government by electronic communication providers in response to search warrants issued to companies. The messages, therefore, were not acquired by the government "through the use of any electronic, mechanical or other device." As a result, the government's acquisition of the text messages did not involve an "intercept" within the meaning of the Wiretap Act.

Moreover, while Jones accurately asserts that text messages constitute "electronic communications" within

the meaning of the Wiretap Act (*see* Def.'s Mot. to Suppress Evid. at 5), this assertion gets him nowhere. Courts consistently have held that the Wiretap Act governs only the acquisition of the contents of electronic communications that occur contemporaneous with their transmission, and not—as is the case here—the subsequent acquisition of such communications while they are held in electronic storage by third parties. *See, e.g., United States v. Steiger*, 318 F.3d 1039, 1048-49 (11th Cir. 2003) (holding that "a contemporaneous interception—*i.e.*, an acquisition during 'flight'—is required to implicate the Wiretap Act with respect to electronic communications"); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (holding that "for [an electronic communication] to be 'intercepted' in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage"); *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 462 (5th Cir. 1994) (analyzing statutory text and legislative history and concluding that "Congress did not intend for 'intercept' to apply to 'electronic communications' when those communications are in 'electronic storage' "); *see also See* Clifford S. Fishman & Anne T. McKenna, *Wiretapping and Eavesdropping* § 2:5 (West, 2d ed. 1995) ("An interception [of an electronic communication] occurs . . . only if the contents are acquired as the communication takes place, not if they are acquired while the communications are in storage.").

Instead, the relevant statutory provision governing searches and seizures of stored electronic communications, such as the text messages at issue here, appears in Title II of the Electronic Communications Privacy Act of 1986 (the "Stored Communications Act"), 18 U.S.C. § 2701 *et seq.* *See* Fishman & McKenna, *supra*, § 26:1

(the Stored Communications Act "spells out the circumstances in which the government may obtain access" to the contents of stored wire or electronic communications.) In pertinent part, it provides that:

> A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation. . . .

Id. § 2703(a).[4] And as courts have recognized, the procedures the government must follow to access the contents of stored electronic communications "are considerably less burdensome and less restrictive than those required to obtain a wiretap order under the Wiretap Act." *Konop*, 302 F.3d at 879. For example, unlike the Wiretap Act, the Stored Communications Act contains no express requirement that the government demonstrate necessity. In light of the substantial differences between the statutory procedures and requirements between the Wiretap Act and the Stored Communications Act, courts consis-

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[4] As used in the Stored Communications Act, which expressly adopts the definitions provided in § 2510 of the Wiretap Act, 18 U.S.C. 2711(1), the term "electronic storage" means "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and "any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17). "Electronic communication service," in turn, is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15).

tently have concluded that "Congress could not have intended" to require the government "to comply with the more burdensome, more restrictive procedures of the Wiretap Act to do exactly what Congress apparently authorized it to do under the less burdensome procedures of the [Stored Communications Act]." *Konop*, 302 at 879; *see also Steve Jackson Games, Inc.*, 36 F.3d at 463 ("to satisfy the more stringent requirements for an intercept in order to gain access to the contents of stored electronic communications").

2. *Probable Cause*

Jones' argument that the text message affidavits lacked probable cause also misses the mark. The task of an issuing magistrate, when assessing probable cause for search warrants

> is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L. Ed.2d 527 (1983). And the duty of a reviewing court, in turn, "is simply to ensure that the [issuing court] had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* at 238-39, 103 S. Ct. 2317 (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960)). The issuing court's determination that probable cause exists "should be paid great deference by reviewing courts." *Gates*, 462 U.S. at 236, 103 S. Ct. 2317 (internal quotation marks omitted). More-

over, in reviewing a warrant application, courts must treat the affidavit "in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965).

Applying these standards, the Court easily concludes that the information contained in Special Agent Yanta's supporting affidavits was sufficient to establish probable cause for the text message warrants. The 29-page August 10th Affidavit, which served as the foundation upon which subsequent affidavits submitted in support of wiretap and search warrant applications were based, references information provided by three confidential sources who had first-hand knowledge of Jones' illicit activity.[5] For example, the affidavit states that Confidential Source Number One ("CS-1") reported having made multi-kilogram purchases of cocaine directly from Jones in the recent past, including at Jones' Levels nightclub. (Def.'s Mot. to Suppress Evid. Ex. 1 at 9, 13.) CS-1 also provided specific pricing, packaging, distribution, and operating information, and detailed vehicles, individuals, and locations that Jones used for transporting and distributing the narcotics. (*Id.* at 12-14.) CS-2

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[5] The affidavit establishes the informants' credibility for providing accurate information. (Def.'s Mot. to Suppress Evid. Ex. 1 at 9, 14, 17.) *See United States v. Bruner*, 657 F.2d 1278, 1297 (D.C. Cir.1981) (issuing court may rely on recital that informant previously provided reliable information without requiring further factual elaboration). Furthermore, none of the three informants had any business or personal relationships with each other and likely did not even know of each other. (*See* Def.'s Mot. to Suppress Evid. Ex. 1 at 14, 17.)

also described having purchased kilogram quantities of cocaine from Jones (*id.* at 14), and independently confirmed details provided to investigators by CS-1 concerning pricing, packaging, vehicles used to transport the drugs, and procedures used to distribute drugs. (*Id.* at 13-16.) The August 10th Affidavit further indicates that CS-3 was in communication with, and made privy to the activities of, a suspected cocaine customer of Jones. (*Id* at 17.)

In addition to the testimony of each of the confidential informants, the August 10th Affidavit also describes at length the results of surveillance, searches, debriefings, review of electronic data, and other investigative techniques. For instance, the affidavit states that alleged co-conspirator Maynard, the manager of the Levels nightclub, was stopped for speeding in North Carolina, while driving a minivan registered to Jones. (Def.'s Mot. to Suppress Evid. Ex. 1 at 11, 18-20.) After an interdiction canine alerted on the right rear area of the minivan, officers searched the vehicle and recovered from a hidden compartment $67,115.00 in U.S. currency, bundled together and contained in plastic bags. (*Id.* at 19.) The affidavit further provides the basis for investigators' belief that Jones and Maynard were using text messaging in an attempt to conceal their alleged narcotics trafficking activities. First, analysis of pen register data indicated that several weeks prior to August 10, 2005, the target cellular telephones showed an increase in text messaging from 50% of all activations to 90%. (*Id.* at 26-27.) And second, the technology to capture the contents of text messages had "only become available to law enforcement within recent weeks." (*Id.* at 27.)

In summary, the Court finds that the affidavit clearly establishes probable cause to believe that Jones operated a conspiracy to distribute narcotics, and that Jones and Maynard were using text messages on their phones to further that conspiracy. Because the August 18th Affidavit contained all of the foregoing information,[6] the Court likewise finds that it is sufficient.

3. *Request for a Franks Hearing*

Although there is a "presumption of validity" with respect to affidavits in support of search warrants, *Franks*, 438 U.S. at 171, 98 S. Ct. 2674, a court is required to hold an evidentiary hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56, 98 S. Ct. 2674; *see also United States v. Dale*, 991 F.2d 819, 843 (D.C. Cir. 1993); *United States v. Sobamowo*, 892 F.2d 90, 94 (D.C. Cir.1989); *United States v. Richardson*, 861

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[6] In addition to the information provided in the August 10th Affidavit, the August 18th Affidavit also states that some of the 180 text messages, submitted to investigators pursuant to the August 10th search warrant issued by Magistrate Judge Kay, were suspicious. (Def.'s Mot. to Suppress Evid. Ex. 2 at 28.) According to the August 18th Affidavit, in light of the context provided by the confidential informants and the increased activity observed by surveillance at the Levels nightclub, investigators believed that certain of the text messages referred to narcotics activity. (*See id.*). Because the Court concludes that other information contained in the affidavit is sufficient to establish probable cause to believe that Jones operated a conspiracy to distribute narcotics, and that Jones and Maynard were using text messages on their phones to further that conspiracy, the Court need not address the reasonableness of the investigators' belief regarding the text messages.

F.2d 291, 293-94 (D.C. Cir.1988). The rule set forth in *Franks*, however, "has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." *Id.* at 167, 98 S. Ct. 2674. As the D.C. Circuit has instructed, "a defendant is entitled to an evidentiary hearing *only* if his attack on the accuracy of the affidavit is 'more than conclusory' and is accompanied by 'allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.' " *United States v. Gaston*, 357 F.3d 77, 80 (D.C. Cir. 2004) (quoting *Franks*, 438 U.S. at 171, 98 S. Ct. 2674) (emphasis added). Furthermore, even if the defendant makes the requisite preliminary showing, a hearing is not required unless the alleged misstatement was material to the finding of probable cause. *See Richardson*, 861 F.2d at 294.

In requesting a *Franks* hearing in connection with the August 10th and the August 18th Affidavits, Jones argues that Special Agent Yanta "omitted certain unhelpful facts while touting other facts for the sole purpose misleading" the issuing court. (Def.'s Mot. to Suppress Evid. at 3.) More specifically, he contends that Special Agent Yanta omitted pertinent details concerning (1) the context of the Levels nightclub; (2) the legitimate relationships between Jones and his associates; (3) phone activation figures; and (4) the context of several text messages. (*Id.* at 8-15.) Jones arguments are both factually incorrect and legally without merit.

First, his contentions that Special Agent Yanta omitted details regarding the context of his "legitimate" business activities and associations are false. To the contrary, based on information provided by confidential

sources and obtained through surveillance, the affidavits set forth the fact that Jones was using his "legitimate" nightclub business for the purposes of conducting drug trafficking activities and laundering proceeds, and that Jones employed Maynard both as his nightclub manager and as an assistant in his narcotics business. (*See, e.g.*, Def.'s Mot. to Suppress Evid. Ex. 1 at 7.) Moreover, this latter disclosure regarding Maynard's dual roles belies Jones' assertion that the affidavit omitted information tending to indicate that the number of activations between Maynard's and Jones' cellular telephones is related to their operation of a nightclub and not the facilitation of narcotics trafficking.

Furthermore, even if Jones could prove that the affidavits contain material false statements, which he cannot, he has offered no proof that Special Agent Yanta made such misstatements or omissions with the requisite scienter-namely, that she intentionally tried to deceive the issuing court or manifested a reckless disregard for the truth. And perhaps most significantly, the alleged omissions were immaterial to the magistrate judge's probable cause determination. That is to say, even without the contested portions (or rather, even with the additional details that Jones argues should have been included), the affidavit more than establishes probable cause.[7] The fact that legitimate nightclub activities may have taken place at Levels; that Jones may have had personal or legitimate business relationships with some or

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[7] In this regard, with respect to Jones' assertion that Special Agent Yanta, in her August 18th Affidavit, misleadingly referenced portions of text messages out of context, the Court already has concluded that the referenced text messages are immaterial to a finding of probable cause. *See supra* note 8.

all of his associates referenced in the affidavit; or that the contested text messages were sexual in nature rather than indicative of illegal activity simply does not undermine the wealth of facts in the affidavit establishing probable cause to believe that Jones was operating a large-scale cocaine business.

Accordingly, because Jones has offered little more than conclusory assertions, some of which are factually incorrect, that Special Agent Yanta omitted information that is material to a court's probable cause determination, he is *not* entitled to a *Franks* hearing.[8]

B. The Wire Tap Affidavits

On September 2, 2005, the government applied, pursuant to 18 U.S.C. § 2518, for an Order from the Honorable Paul L. Friedman, authorizing the interception of communications occurring to and from the cellular telephone used by Jones. In support of the application, the government again submitted an affidavit sworn to by Special Agent Yanta (the "September 2nd Affidavit"). That same day, Judge Friedman issued an Order authorizing electronic surveillance for a period of thirty days, and on September 30, 2005, at the government's request, supported by yet another affidavit by Special Agent

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[8] Having concluded that the affidavits in support of the text message search warrants satisfied the standard for probable cause and that a *Franks* hearing is not warranted, the Court need not address the government's arguments that (1) the Stored Communications Act does not create a statutory suppression remedy (Gov't's Omnibus Mot. at 10); (2) the Wiretap Act, while providing such a remedy for improperly intercepted oral and wire communications, does not provide such a remedy for electronic communications (*id.* at 9 n. 3); and (3) regardless, Jones has no protected Fourth Amendment interest in text messages in the hands of third parties. (*Id.* at 10-11.)

Yanta (the "September 30th Affidavit"), Judge Friedman authorized an extension of the interception period for an additional thirty days. On October 24, 2005, the government terminated the intercept.

As noted, Jones claims that the affidavits submitted in support of the government's wiretap application violated both the probable cause and necessity requirements of the Wiretap Act; that the affidavits contained deliberate, material misstatements; and that the government impermissibly failed to minimize the intercepted wire communications.[9]

1. *The Wiretap Act*

Jones certainly is correct that the government's interception of his telephone calls is governed by the Wiretap Act. It requires that an application for the interception of certain oral, wire or electronic communications shall be in writing, under oath, and shall contain certain information including "a full and complete statement of the facts and circumstances relied upon by the applicant[ ] to justify his belief that an order should be issued." *Id.* § 2518(1). On the basis of the facts submitted by the applicant, a district court may authorize a wiretap upon finding that (1) probable cause exists to believe that an individual has committed or is about to commit one of certain enumerated offenses; (2) probable cause exists to believe that "particular communications concerning that offense will be obtained" through an interception; (3) "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to

[9] Although Jones purportedly challenges both affidavits submitted in support of the government's wiretap application, he only addresses the September 2nd Affidavit in his argument.

succeed if tried"; and (4) probable cause exists to believe that the communication facility sought to be wiretapped "[is] being used, or [is] about to be used, in connection with the commission of [the] offense." *Id.* § 2518(3)(a)-(d); *see also United States v. Donovan*, 429 U.S. 413, 435, 97 S. Ct. 658, 50 L. Ed. 2d 652 (1977). The determination that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(3)(c), is referred to as the "necessity requirement," which is the "keystone of congressional regulation of electronic eavesdropping." *United States v. Williams*, 580 F.2d 578, 587-88 (D.C. Cir. 1978).

The statute also requires that "[e]very [wiretap] order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable [and] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . . " 18 U.S.C. § 2518(5). This is referred to as the "minimization requirement." Although "[t]he statute does not forbid the interception of all nonrelevant conversations," the government must make reasonable efforts to "minimize" the interception of such conversations. *Scott v. United States*, 436 U.S. 128, 139-40, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978). The statute also provides that an order authorizing an interception cannot extend "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." 18 U.S.C. § 2518(5). Furthermore, the statute provides that "no part of the contents of [intercepted] communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . if the disclosure of that information

would be in violation of this chapter." *Id.* § 2515. Any "aggrieved person" may move to suppress the introduction of wiretap evidence or its fruits if "the communication was unlawfully intercepted," the "order of authorization or approval under which it was intercepted is insufficient on its face," or if "the interception was not made in conformity with the order of authorization or approval." *Id.* § 2518(10)(a)(i)-(iii); *see also Donovan*, 429 U.S. at 433-34, 97 S. Ct. 658.

2. *Probable Cause*

Having found that the August 10th Affidavit submitted in support of the first text message search warrant establishes probable cause to believe that Jones operated a conspiracy to distribute narcotics, it follows that the September 2nd Affidavit is sufficient because, as even Jones concedes, the September 2nd Affidavit relies in significant part on the information contained in the August 10th Affidavit. (*See* Def.'s Mot. to Suppress Evid. at 11-15.) Furthermore, the September 2nd Affidavit also states that surveillance of Jones and the Levels nightclub revealed that a number of the individuals whom the confidential informants linked to narcotics activity were in frequent contact with Jones. (Def.'s Mot. to Suppress Evid. Ex. 3 ¶¶ 75, 79, 80.) Pen register data included in the affidavit, in turn, verified that the target cellular telephone was in contact with phones used by these individuals as well as a number of other persons with drug convictions or histories of drug activity. (*Id.* ¶¶ 84-91.) The Court accordingly finds that the affidavit satisfies the applicable probable cause requirements.

3. *Necessity*

Jones contends that the government violated the Wiretap Act's necessity requirement because it failed to conduct all other methods of investigation before resorting to wire intercepts. Specifically, he alleges that, based upon the information contained in Special Agent Yanta's affidavits, the government never attempted (1) to perform surveillance at the Levels nightclub, (2) to perform surveillance at Jones' home or at the homes or employment sites of his alleged co-conspirators, or (3) to make undercover drug purchases. (*See* Def.'s Mot. to Suppress Evid. at 11, 15, 21-24.)

Congress created the necessity requirement to ensure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 n. 12, 94 S. Ct. 977, 39 L. Ed.2d 225 (1974). Thus, a court should "give close scrutiny" to a contested wiretap application and "reject generalized and conclusory statements that other investigative procedures would prove unsuccessful." *Williams*, 580 F.2d at 588. Because, however, the "statutory command was not designed to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, the government will meet its burden of demonstrating necessity if it shows that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation." *United States v. Carter*, 449 F.3d 1287, 1293 (D.C. Cir. 2006) (internal quotation marks and citation omitted). Moreover, while this requirement compels the government to demonstrate that it has made a good faith effort to utilize a range of con-

ventional law enforcement techniques before it resorts to the more intrusive means of electronic eavesdropping, the statute does not require the literal exhaustion of all other possible investigative approaches. *See United States v. Lopez*, 300 F.3d 46, 52-53 (1st Cir. 2002) ([T]he necessity requirement is not tantamount to an exhaustion requirement.); *United States v. Thompson*, 210 F.3d 855, 858-59 (8th Cir. 2000). Instead, in a case involving a wide-ranging conspiracy, the government must simply provide an adequate basis for the court to make a practical, common-sense determination that other methods would likely prove inadequate to reveal the operation's "full nature and scope." *United States v. Brown*, 823 F.2d 591, 598 (D.C. Cir. 1987); *see also United States v. Nelson-Rodriguez*, 319 F.3d 12, 33 (2003). This determination is reviewed only for abuse of discretion. *See United States v. Sobamowo*, 892 F.2d 90, 93 (D.C. Cir. 1989).

In this case, the September 2nd Affidavit amply satisfies the necessity requirement.[10] The affidavit details the normal investigative procedures that already had been tried, including the use of physical and video surveillance, confidential informants, pen registers, interviews, public records, and search warrants, and noted that while these techniques had been probative "in proving that an ongoing illegal narcotics business is operating," they had not "yielded sufficient evidence or ascertained the identities of, and proven beyond a reasonable doubt, the guilt of all those participants in this illegal conspiracy." (Def.'s Mot. to Suppress Evid. Ex. 3 ¶ 93.) Fur-

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[10] Nor has Jones demonstrated that there are any material misstatements or omissions in the September 2nd Affidavit.

ther information is then provided as to the specific failings of each of these and other approaches and the role that wiretap evidence would likely provide in filling these gaps.[11] "Having engaged in an adequate range of investigative endeavors, the government properly sought wire-

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[11] For example, physical surveillance had yielded little valuable information to further the investigation, other than confirming that some of the identified members of the alleged conspiracy associated with one another. Efforts to observe the members of the alleged conspiracy had been frustrated by the FBI's limited ability to obtain advanced information concerning planned activities. (Def.'s Mot. to Suppress Evid. Ex. 3 ¶ 93(a).) Undercover operations also had their limitations; Jones was believed to deal only with known associates, and the FBI knew of no known source who was in a position to purchase narcotics from Jones or to introduce an undercover officer for that purpose. These circumstances limited the ability of investigators to amass sufficient evidence as to the manner in which Jones allegedly redistributed large quantities of narcotics in the Washington, D.C. area, the identities of all other members of the alleged conspiracy, or the manner in which Jones and others disposed of the proceeds of the operation. (*Id.* ¶ 93(b).) The confidential sources who has provided much of the probable cause for the affidavit had information that was principally "historical in nature," and although a number of individuals who were believed to be customers of Jones had been arrested, none was willing to cooperate with the government. (*Id.* ¶ 93(d).) Similar representations have led courts to find the use of wiretaps necessary under § 2518(1)(c). *See, e.g., United States v. Williams*, 124 F.3d 411, 418 (3d Cir. 1997) (necessity requirement satisfied where use of informants was thought too dangerous and conspirators regularly used evasive techniques to avoid other kinds of law enforcement infiltration); *United States v. Carrazana*, 921 F.2d 1557, 1564-65 (11th Cir. 1991) (necessity existed where drug ring used counter-surveillance to frustrate investigation); *United States v. Macklin*, 902 F.2d 1320, 1327 (8th Cir. 1990) (necessity found where affidavit disclosed that normal methods, including physical surveillance, pen registers, and confidential information had been tried and failed to "disclose the scope of the conspiracy and all the persons involved," and other tactics, including grand jury investigation and undercover operations had been rejected as too dangerous).

tap permission and was not required to enumerate every technique or opportunity missed or overlooked." *Sobamowo*, 892 F.2d at 93.

Indeed, the September 2nd Affidavit indicates that the government sought the wiretap in order to uncover the full extent of the alleged conspiracy, including how Jones laundered the proceeds of his criminal enterprise. From the government's perspective, wiretaps represented "the only reasonable method of developing evidence of the full scope of the suspected violations being committed by the target subjects and others as yet unknown or not yet fully identified" (Def.'s Mot. to Suppress Evid. Ex. 3 ¶ 95.) The use of wiretaps for such purposes in comparable investigations has been repeatedly upheld. *See, e.g., Lopez*, 300 F.3d at 53-54 (identities of some conspirators); *United States v. Diaz*, 176 F.3d 52, 111 (2d Cir. 1999) (sources of drug supply and location of drug proceeds); *United States v. Cooper*, 868 F.2d 1505, 1510 (6th Cir. 1989) (customers and agents of drug ring). Thus, even where the government has other evidence linking a defendant to a crime, § 2518 does not prevent it from obtaining wiretaps in order to "ascertain the extent and structure of the conspiracy." *United States v. Plescia*, 48 F.3d 1452, 1463 (7th Cir. 1995); *see also United States v. McGuire*, 307 F.3d 1192, 1198-99 (9th Cir. 2002) ("The government's possession of evidence sufficient to indict some conspirators does not bar it from seeking evidence against others. . . . [T]here was a powerful government interest in identifying all conspirators and the full scope of the conspiracy."). The necessity requirement is not meant to work as an impediment to making a good case better, or a strong case airtight.

Moreover, as detailed above, the government's affidavits regarding the necessity for wiretaps were not based merely on conclusory statements about the difficulties of investigating large-scale narcotics distribution conspiracies in general, but instead provided specific information about the *Jones operation* that limited the effectiveness of conventional investigative methods, and made the request for wiretaps not merely useful but indispensable. *See United States v. Johnson*, 696 F.2d 115, 123-24 (D.C. Cir. 1982) (rejecting defendant's challenge to wiretap orders where the government's supporting affidavit "revealed that the wiretap was sought only after more than six months of extensive investigation, discussed a number of techniques that had been tried or considered, and amply demonstrated the need for electronic surveillance *in this particular investigation*"). Therefore, in light of the considerable documentation presented by the government concerning the progress of its investigation and the difficulties of gathering the evidence needed to present a complete picture of the extensive criminal activity that was being uncovered, the Court concludes that Judge Friedman did not abuse his discretion in initially authorizing the wiretap on September 2, 2005, and in authorizing an extension of the wiretap on September 30, 2005.

4. *Minimization*

While Jones also challenges the degree to which intercepted conversations were appropriately minimized (Def.'s Mot. to Suppress Evid. at 25-26), he points to no specific conversations that he claims should have been minimized. Instead, he baldly asserts that the government should have minimized all conversations between the targets "pertaining to their joint business ventures

as well as social or other matters unrelated to a drug distribution conspiracy." (*Id.* at 25.) Allegations of this type are insufficient, as recently affirmed by the D.C. Circuit in *Carter*. The defendant in *Carter* challenged a wire intercept by presenting evidence that only 27% of the non-pertinent calls in the intercept had been minimized. He also alleged that non-pertinent calls had been monitored, particularly conversations concerning golf, but pointed to no specific conversations. On that record the district court rejected the contention without any evidentiary hearing. The D.C. Circuit agreed because:

> What the wiretapping statute forbids is failure by the government to make reasonable efforts to minimize interceptions of non-pertinent communications; consequently, a defendant must identify particular conversations so that the government can explain their non-minimization. Having failed to identify 'specific conversations that should not have been intercepted, or even . . . a pattern of such conversations,' . . . *the issue of reasonable minimization was simply not in play.*

Carter, 449 F.3d at 1295 (internal citation omitted) (emphasis added). Here too, because Jones has failed to identify even a single conversation that should have been minimized, he has not properly raised the issue of reasonable minimization.

II. Motion to Adopt and Conform to Co-defendant's Motions

Because the deadline for filing has expired and none of Jones' co-defendants has filed a substantive motion, this motion by Jones is denied as moot.

III. Motion for a Preliminary Determination of Conspiracy and Pretrial Ruling on the Admissibility of Co-conspirators' Statements

Jones also has moved for a pretrial hearing on the admissibility of co-conspirator statements. The admission of co-conspirator statements is governed by Fed. R. Evid. 801(d)(2)(E), which requires proof of the following: (1) a conspiracy, (2) between the declarant and the co-defendant, and (3) statements made in furtherance of the conspiracy. Here, the government persuasively argues that no pretrial hearing is necessary and that the Court instead should admit the statements during trial subject to the contingent relevancy rule of Fed. R. Evid. 104(b).

It is accepted in this jurisdiction that district courts have discretion to admit co-conspirator statements conditionally, "subject to connection" at the close of the government's case to the three requirements of Rule 801(d)(2)(E) (co-conspirators making statements in furtherance of the conspiracy). *See United States v. Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (holding that a district court has "no obligation" to conduct a "mini-trial" before trial to determine the existence of the conspiracy and noting that a district court is "vested with considerable discretion to admit particular items of evidence 'subject to connection'"); *United States v. Gantt*, 617 F.2d 831, 845 (D.C. Cir. 1980) ("As a practical matter, to avoid what otherwise would become a separate trial on the issue of admissibility, the court may admit declarations of co-conspirators 'subject to connection.' ").[12]

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[12] This approach has been used in recent cases similar in scope and nature to this one. *See, e.g., United States v. Edelin*, 128 F. Supp. 2d 23, 45-46 (D.D.C. 2001) (finding it unnecessary to conduct an advance

Here, given that the indictment includes a total of 94 overt acts in furtherance of the alleged narcotics conspiracy and considering the large number of witnesses expected to testify, the Court finds that such a preliminary hearing would be immensely time-consuming and would unnecessarily delay the trial. Therefore, in accordance with the governing practice in this jurisdiction, the Court denies defendant's motion and will allow the admission of co-conspirator statements at trial subject to proof of connection. Of course, if the requisite connection is not demonstrated at trial, the Court will strike the testimony and provide a cautionary instruction to the jury.

IV. Motion For an Order Directing the Government to Specify All Evidence Which May Be Subject to Suppression

Because the Court already has ordered the government to specify all the evidence it intends to introduce at trial, and the government has complied,[13] this motion is denied as moot.

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determination of conspiracy, which would amount to a time-consuming "mini-trail prior to trial in this case" and place an unreasonable burden on the government); *United States v. Cooper*, 91 F. Supp. 2d 60, 78 (D.D.C. 2000) (noting, in a RICO conspiracy case, that it is common practice in the D.C. Circuit to admit declarations of co-conspirators subject to connection).

[13] The government has acknowledged that the 21-page itemization of evidence that it intends to rely on at trial, filed on June 5, 2006, is over-inclusive. Accordingly, the government has represented that, "[a]s the case pares down," it will alert counsel for the defendants to those items of evidence that it no longer anticipates relying on at trial. (Gov't's Omnibus Opp'n at 42.) It is noted that by Order dated June 27, 2006, the government must file a list of all exhibits it intends to use at trial.

V. Motion For Discovery of Co-Defendant And Co-Conspirator Statements

Jones seeks an order directing the government to provide discovery of "any statements made by co-defendants or alleged co-conspirators that the government intends to offer against him pursuant to Fed. R. Crim. P. 801(d)(2)(E)." (Def.s' Omnibus Mot. at 13.) To the extent that such statements are those of testifying witnesses, they are covered by the Jencks Act and must be produced by the government in accordance therewith. To the extent that Jones seeks discovery of statements made by co-defendants or co-conspirators whom the government does not intend to call at trial, his motion must be denied. The D.C. Circuit has ruled on this precise question, finding itself "without authority to order such discovery" because "[n]othing in the Federal Rules of Evidence or in the Jencks Act requires such disclosure." *United States v. Tarantino*, 846 F.2d 1384, 1418 (D.C. Cir. 1988). The court, therefore "decline [d] to extend the defendant's right to discovery beyond that required by statute or the Constitution." *Id.* This approach concords with the majority of other circuits. *See, e.g., United States v. Orr*, 825 F.2d 1537 (11th Cir. 1987); *United States v. Roberts*, 811 F.2d 257 (4th Cir. 1987) *(en banc)*; *United States v. Percevault*, 490 F.2d 126 (2d Cir. 1974.) Thus, to the extent that co-defendant or co-conspirator statements are not otherwise discoverable, defendant's motion is denied.

VI. Motion to Suppress Tangible Evidence Seized From Jones' Waldorf, Maryland Home[11]

On October 22, 2005, law enforcement agents obtained a search warrant for several locations, including Jones' home at 10870 Moore Street in Waldorf, Maryland. The warrant application was supported by a 47-page affidavit sworn to by Special Agent Yanta. (Def.'s Omnibus Mot., Ex. 2.) During the course of the search of the Moore Street residence on October 24, 2005, agents located a Jeep Cherokee parked inside the garage attached to the house. Jones was provided with and signed a consent form authorizing the agents to search the vehicle. (*Id.*, Ex. 3.)

Jones asserts three claims in support of his motion to suppress the evidence seized from the Moore Street address. First, he argues that the search warrant for the home was invalid because it was tainted by evidence obtained through illegal wiretapping and because it was based on false affidavit. (*Id.* at 14.) As already decided, there was no violation of law in connection with the government's interception of telephone conversations from Jones' cellular telephone. Nor was Special Agent Yanta's affidavit faulty, for it exhaustively details why investigators believed they had uncovered a massive international cocaine smuggling and distribution conspiracy with Antoine Jones as the conspiracy's ringleader in the Washington, D.C. area. The affidavit supplies the agent's ba-

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[11] Though Jones styled this motion as one to "Suppress Tangible Evidence Obtained From Jeep Cherokee" in his Omnibus Motion, he actually seeks suppression of "all evidence obtained as a result of the search of 10870 Moore Street, Waldorf, Maryland." (Def.'s Omnibus Mot. at 16.)

sis of knowledge for the information contained therein, which includes confidential source information, police surveillance, and interceptions of wireless communications between Jones and his alleged co-conspirators. (Def.'s Omnibus Mot. Ex. 2.) Specifically with respect to the Moore Street location, the affidavit notes that "a Jeep Cherokee (registered in the name of Deniece Jones)" had "been observed parked at the Moore Street Address," and that "[s]urveillance frequently showed Antoine Jones driving the Jeep." (*Id.* at 34-35.)

The Court therefore concludes that the affidavit clearly establishes probable cause to search Jones' Moore Street residence, and moreover, for the reasons previously explained, Jones is not entitled *Franks* hearing to determine the validity of the warrant because he has alleged no facts to support his claim that the affidavit contained "intentional misstatements and a reckless disregard for the truth." (*Id.* at 14.)

Jones next argues that the investigating officers violated Fed. R. Crim. P. 41(f) by failing to "present either Jones, his wife or son a copy of the warrant with attachment to inform them of the scope of the warrant, nor did they leave a copy on the premises." (Def.'s Omnibus Mot. at 16.) Under Rule 41(f), the "officer executing the warrant must . . . give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or . . . leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(3). In support, Jones cites *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), for the proposition that all evidence seized during a search conducted in violation of Rule 41(f) should be suppressed. The D.C. Circuit has

not resolved the question of whether a violation of Rule 41 merits the suppression of the disputed evidence. *See United States v. Weaks*, 388 F.3d 913, 915 (D.C. Cir. 2004) (referring to question as "undecided"). The Ninth Circuit in *Gantt* held, however, that "[v]iolations of [Rule 41(f)] do not usually demand suppression." 194 F.3d at 1005. Rather, "only if there was a deliberate disregard of the rule or if the defendant was prejudiced," is suppression necessary. *Id.* (internal quotation marks omitted). Jones' claim is belied, however, by the unrebutted fact that the returned copy of the warrant notes that a "copy of warrant and receipt for items" was left with Deniece Jones, defendant's wife. (Def.'s Omnibus Mot. Ex. 2 at 53.) Deniece Jones' signature is affixed to each page of a five-page receipt for goods taken during the search. (*Id.* at 54-58.) Therefore, at the very least, Jones was provided with a copy of the warrant and a receipt at the conclusion of the search.[15]

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[15] Neither the government nor defendants allege or present any evidence to demonstrate whether the warrant was served at the outset of the search. As the Supreme Court has noted, "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search." *Groh v. Ramirez*, 540 U.S. 551, 563 n.5, 124 S.Ct. 1284, 157 L. Ed. 2d 1068 (2004). The Court declined, however, to express an opinion on "[w]hether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." *Id.* Therefore, in the absence of any allegation that Jones requested that officers provide him a copy of the warrant at the outset of the search, the Court has no reason to suspect that the officers actions were "unreasonable" within the meaning of the Fourth Amendment or that there was any prejudice to defendant even if he did not receive the warrant until after the search was completed. "Prejudice in this context means the search would otherwise not have occurred or would have been less intrusive absent

Third, Jones asserts that the search of the Jeep Cherokee parked in the attached garage at the Moore Street residence was illegal because he signed the consent form authorizing the search involuntarily. Jones alleges that he "felt [he had] no choice but to sign the paper" because he was "guarded by several heavily armed agents after having been rudely awakened." (Def.'s Omnibus Mot. at 15.) Jones' argument fails, however, because the officers did not need to rely on his consent to search the Jeep; the search of the vehicle was authorized by the original search warrant. Courts have consistently held that a search of "the premises" of a home includes vehicles located within its curtilage. *See, e.g., United States v. Duque*, 62 F.3d 1146, 1151 (9th Cir. 1995); *United States v. Singer*, 970 F.2d 1414, 1418 (5th Cir. 1992); *United States v. Gottschalk*, 915 F.2d 1459, 1461 (10th Cir.1990); *United States v. Percival*, 756 F.2d 600, 612 (7th Cir. 1985). Moreover, the affidavit in support of the warrant application specifically noted the Jeep Cherokee as having "been observed parked at the Moore Street Address," and that "[s]urveillance frequently showed Antoine Jones driving the Jeep." (Def.'s Omnibus Mot. Ex. 2 at 34-35.) Therefore, the warrant authorizing a search of the premises of 10870 Moore Street also authorized the search of the Jeep Cherokee parked in the garage attached to the house, rendering the consent form superfluous.[16]

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the error." *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1283 (9th Cir. 1992). Here, the Court has already upheld the validity of the warrant. There is no likelihood that the scope of the search would have been altered by defendant's receipt of the warrant at the beginning of the search.

[16] Nor does Jones' argument, based on *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed.2d 564 (1971), that agents should

VII. Motion to Suppress Evidence Obtained From Mobile Tracking Device

Jones also has moved to suppress the data obtained from an electronic tracking device—a Global Positioning System ("GPS")—which law enforcement agents placed on his Jeep Cherokee pursuant to an Order issued by the Honorable Paul L. Friedman on September 16, 2005. In support of the motion, Jones advances two arguments. First, he contends that Special Agent Yanta's affidavit in support of the application for GPS authorization lacked probable cause to believe that his vehicle "was in any manner being used for criminal activity." (Def.'s Omnibus Mot. at 18.) Second, Jones asserts that the government placed the GPS device on his vehicle both after the Order authorizing its placement had expired and while the vehicle was located outside of the issuing court's jurisdiction. (*See* Defendant Jones' Supplemental Omnibus Pre-Trial Motion at 3-6.) In response, while conceding the "technical" violations of the September 10, 2005 Order (Gov't's Omnibus Opp'n at 52 n. 12), the government contends that the placement of the GPS device was proper—"even in the complete absence of a court order"—because Jones lacked a reasonable expectation of privacy in the whereabouts of his vehicle. (*Id.* at 51.)

The government is correct, but only to a point. As a number of courts have held, the government is not required to obtain a court order or search warrant to in-

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not have been able to seize the car without having a warrant specific to the vehicle, have any validity. *Coolidge* involved a warrantless search incident to arrest at the suspect's home. *Id.* at 457, 91 S. Ct. 2022. This case, by contrast, involves a search of a residence pursuant to a valid warrant that, by law, authorized the search of vehicles within the curtilage of the home. *Coolidge* is therefore inapposite.

stall a GPS or similar tracking device on a vehicle. *See United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999) (placement of tracking device is neither search nor seizure under the Fourth Amendment); *United States v. Moran*, 349 F. Supp. 2d 425, 467 (N.D.N.Y. 2005) (no Fourth Amendment violation through installation of GPS device without a warrant because "law enforcement personnel could have conducted a visual surveillance of the vehicle as it traveled on the public highways"). These courts have relied upon the Supreme Court's statement in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L. Ed. 2d 55 (1983), a case involving a "beeper" device installed in a container that was secreted in a vehicle, that:

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the suspect] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id. at 281-82, 103 S. Ct. 1081. The very next year, however, in *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L. Ed. 2d 530 (1984), a case that also involved a "beeper" device secreted in a vehicle, the Court distinguished between monitoring in public spaces versus private locations. In doing so, it held that, while the data in question that was obtained from the device while on the public roads was admissible, information that was obtained from the tracker while it was inside the private residence was not, because the residents had a justifiable

interest in privacy in their home. *Karo*, 468 U.S. at 715, 104 S.Ct. 3296. Accordingly, as the government here essentially concedes (Gov't's Omnibus Opp'n at 55 n. 14), the data obtained from the GPS device when the Jeep Cherokee was parked in the garage adjoining the Moore Street property must be suppressed. All other data obtained from the device is admissible.

VIII. Motion to Suppress Tangible Evidence Seized From Green Honda Odyssey Minivan

Jones also has moved to suppress the approximately $67,115 in cash discovered in a secret compartment in his 1997 Honda Odyssey minivan during a traffic stop in Durham, North Carolina. (Def.'s Omnibus Mot. at 19.) Though owned by Jones, the vehicle was being driven at the time by his co-conspirator, Lawrence Maynard. Maynard was accompanied by Derrick Gordon. (*Id.*) When a Durham police officer stopped the vehicle for speeding, Maynard gave him his license and a registration card indicating that the owner of the vehicle was Antoine Jones. (*Id.*) The officer, having become suspicious after Maynard and Gordon gave conflicting stories regarding the purpose of their trip when questioned separately, asked Maynard for permission to search the minivan. Maynard consented to the search. (*Id.*)

Jones claims that it was not reasonable for the officer to believe that Maynard had authority to consent to the search because the officer was on notice that he was not the owner of the vehicle. (*Id.* at 19-20.) That is simply not the case. The officer acted reasonably in searching the vehicle based on Maynard's consent because Jones gave up any reasonable expectation of privacy he had in the contents of the vehicle when he entrusted complete con-

trol over it to Maynard. *See United States v. Powell*, 929 F.2d 1190, 1196 (7th Cir. 1991) (owner of pickup truck lacked legitimate expectation of privacy where vehicle was driven by another more than 1,000 miles away); *see also United States v. Fuller*, 374 F.3d 617, 622 (8th Cir. 2004). The Supreme Court has held that consent "obtained from a third party who possessed common authority over . . . the . . . effects sought to be inspected" is valid. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed.2d 242 (1974). "Common authority" is defined as "joint access or control for most purposes," such that the owner has "assumed the risk" that another might consent to a search of the shared item. *Id.* at 171 n. 7, 94 S. Ct. 988. The D.C. Circuit has held that an owner's "Fourth Amendment rights were not violated when the police, with . . . justification . . . made a warrantless search of those portions of the car which the owner had delivered access and control to others." *United States v. Free*, 437 F.2d 631, 635 (D.C. Cir. 1970). There is no contention here that Jones' transfer of authority over the vehicle to Maynard was anything but complete and unequivocal. Rather, the allegation is merely that the officer failed to act reasonably in acting on Maynard's consent. (Def.'s Omnibus Mot. at 19.) On the contrary, however, the Court finds that the officer did act reasonably because Jones ceded complete control to Maynard, thereby assuming the risk that he might consent to a search of his vehicle, while he was driving it out-of-state in North Carolina.

IX. Motion to Suppress Evidence Seized at Levels Nightclub

Jones alleges that the warrant issued for the search of Levels nightclub was invalid because the affidavit on which it was based "presented intentional misstatements and a reckless disregard for the truth" and because it was tainted by evidence obtained through illegal wiretapping. (Def.'s Omnibus Mot. at 21.) As noted above, "to mandate an evidentiary hearing" under *Franks*, "the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood and those allegations must be accompanied by an offer of proof." 438 U.S. at 171, 98 S. Ct. 2674. Jones alleges no facts to support his claim that the affidavit contained "intentional misstatements and a reckless disregard for the truth." (*Id.* at 21.) The Court therefore upholds the validity of the warrant and the use of the evidence obtained through electronic interceptions in the affidavit.

CONCLUSION

For the foregoing reasons, defendant's motions are denied with the exception that the government cannot use GPS tracking data obtained when the Jeep Cherokee was parked in the garage adjoining Jones' Moore Street property. The Court will consider the parties' arguments regarding the government's Rule 404(b) motion and defendant's motions for a bill of particulars and for disclosure of confidential informants at the hearing on Monday, August 14, 2006.

ORDER

For the reasons given in the attached Memorandum Opinion, it is hereby

ORDERED that defendant's motions [# s 142, 144, 150, 154, 156, 157, 158, 159, 160, 161] are **DENIED** with the exception that the government cannot use data obtained from the GPS device while Defendant Jones' Jeep Cherokee was parked in the garage adjoining his Moore Street property; and it is

FURTHER ORDERED that the Court will consider the parties' arguments regarding the government's Rule 404(b) motion and defendant's motions for a bill of particulars and for disclosure of confidential informants at the hearing on Monday, August 14, 2006.

OPPOSITION BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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No. 10-1259

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTOINE JONES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the warrantless use of a global positioning system (GPS) tracking device to record respondent's pattern of movements in his vehicle for 24 hours a day for four weeks, and to an extent not practically possible through visual surveillance, invaded a reasonable expectation of privacy and thus constituted a "search" under the Fourth Amendment.

2. Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.

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INTRODUCTION

For four weeks in 2005, law enforcement agents used a global positioning system (GPS) tracking device to record every movement respondent Antoine Jones, his wife, and his son made in their vehicle for 24 hours of every day. The satellite-based GPS device produced information not just about respondent's discrete journeys and stops, but also about a more intimate and intrusive pattern of his repeated movements and habits. And once the GPS device was attached to the vehicle, the government was able to record Jones's movements automatically and remotely, for as long as it wished, as long as it occasionally recharged the device's batteries.

The court of appeals held that the 24-hour GPS monitoring of Jones's movements for an extended period of time—and to an extent not practically possible through visual surveillance—invaded Jones's reasonable expectation of privacy. The court therefore held that the prolonged GPS monitoring constituted a search under the Fourth Amendment and required a valid warrant or a showing that the search was reasonable without a warrant. Because the government failed to meet either requirement in this case, and the introduction of the GPS evidence is not harmless error on the particular facts in the record, the court of appeals reversed Jones's conviction for a narcotics conspiracy offense.

The court of appeals's holding is not inconsistent with this Court's precedents; does not conflict with the decision of any other federal court of appeals or state high court; is correct; and could be affirmed on alternative grounds. The government has identified

no adequate reason for this Court to intervene before a genuine circuit split has developed. And there are good reasons not to intervene prematurely when, as here, the questions presented are not only legally but also technologically complex. Accordingly, the government's petition for certiorari should be denied.

If the government's petition were granted, however, the Court should also review the alternative argument Jones raised below: whether Jones's Fourth Amendment rights were violated not only through the extended GPS tracking, but also through the installation of the GPS device on his vehicle.

STATEMENT OF THE CASE

1. In 1978, the U.S. Department of Defense launched the Navigational Satellite Timing and Ranging Global Positioning System, or GPS, for the U.S. military's use. R. McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. Rev. 409, 414 (2007) (citing Def. Sci. Bd. Task Force, Dep't of Def., *The Future of the Global Position System* 4, 25-26 (2005)) (hereinafter Hutchins). The system operates through 25 satellites orbiting the earth, each of which "continuously transmits the position and orbital velocity of every satellite in the system." *Id.* at 415. The receiver on a GPS device "'listens' to the transmissions of the four closest satellites," and, through a process known as trilateration, "determines its precise location on earth." *Id.* at 415-17.

Through the first two decades of the system's existence, only the military could access accurate en-

crypted GPS satellite signals; unencrypted civilian signals were "intentionally riddled with random errors" to "reduce the accuracy of the information transmitted for civilian purposes." *Id.* at 415. But in 2000, the government decided to make accurate transmissions available for civilian use. *Id.* (citing Statement by the President Regarding the United States' Decision to Stop Degrading Global Positioning System Accuracy, 1 Pub. Papers 803 (May 1, 2000)). That decision led to the development of civilian applications of GPS, "including cellular telephones and onboard navigation systems in automobiles." *Id.* at 414. It also led to the proliferation of law enforcement efforts to employ GPS devices in investigations, including the investigation in this case.

2. a. In September of 2005, law enforcement agents submitted an affidavit and secured a warrant from a federal judge in the District of Columbia authorizing them to attach a GPS device to a jeep registered to Jones's wife. Pet. App. 66a-74a; Pet. 3-4.[1] By its terms, the warrant was valid for only ten days

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[1] The government asserts that Jones was the "exclusive" driver of the jeep. Pet. 3 n.1. But the agents did not make this assertion when they sought a warrant. And no representation to that effect appears in the accompanying application for GPS tracking or in the incorporated affidavit seeking approval for wiretapping. App. I-257, 269, 346-39. Furthermore, the government made no effort to stop or minimize the GPS device's indiscriminate tracking of the jeep in the event that Mrs. Jones, the Jones's college-age son, or someone other than Jones were to use the vehicle. Nonetheless, for convenience, this brief refers to the vehicle as being driven by Jones himself.

and authorized the installation of the GPS device only within the District of Columbia. *Id.*

The agents failed to comply with the warrant's requirements. They attached the GPS device to Jones's car while it was parked in a public parking lot in Maryland, not in the District of Columbia. Pet. App. 38a-39a n. *. By the time the agents attached the GPS device and later returned to reboot the device, the warrant's 10-day period had expired. *Id.* at 83a. Moreover, the agents decided to use the GPS device to record Jones's movements for 24 hours a day for four weeks—far beyond the ten days that had been authorized under the expired warrant. App. Br. 48 (citing record). As a consequence, the agents could not rely on the warrant to justify their actions.

b. A federal grand jury in the District of Columbia indicted Jones for conspiracy to distribute five kilograms or more of cocaine, and use of telecommunications facilities in furtherance of narcotics trafficking, in violation of 21 U.S.C. §§ 843(b) and 846. Prior to trial, Jones moved to suppress the GPS evidence. The district court denied relief, with the exception of the signals that had emanated while the jeep was parked in Jones's garage. Those signals, the trial judge reasoned, came from inside a private residence where Jones had a reasonable expectation of privacy under *United States v. Karo*, 468 U.S. 705, 715 (1984). Pet. App. 54a, 83a-85a.

Jones was acquitted of all unlawful telecommunications charges at his first trial, but the jury hung on the conspiracy charge. At Jones's second trial, the GPS logs proved essential to the prosecution's case, as they linked Jones's movements to the

claimed stash house. Jones was convicted of the conspiracy charge. *Id.* at 2a, 30a n.*, 39a-41a.

3. On appeal, Jones argued that both the installation of the GPS device and the resulting remote surveillance violated his Fourth Amendment rights. The court of appeals did not address the installation claim, however, because it agreed that the prolonged, warrantless 24-hour surveillance was an unconstitutional search. *Id.* at 15a-42a.

a. The court of appeals's opinion began by explaining that this Court's decision in *United States v. Knotts*, 460 U.S. 276 (1983), does not resolve whether prolonged, 24-hour GPS surveillance constitutes a Fourth Amendment search. *Knotts* approved of the use of a beeper device that aided law enforcement officials in visually monitoring the movements of a vehicle during the course of a single journey. It "explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case." Pet. App. 17a. "*Knotts* held only that '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another,' not that such a person has no reasonable expectation in his movements whatsoever, world without end, as the Government would have it." *Id.* at 19a (quoting *Knotts*, 460 U.S. at 281).

In fact, the court of appeals observed, *Knotts* "specifically reserved the question whether a warrant would be required in a case involving 'twenty four hour surveillance.'" *Id.* at 17a-18a (quoting

Knotts, 460 U.S. at 283-84). *Knotts* cautioned that "'if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.'" *Id.* at 18a (quoting *Knotts*, 460 U.S. at 84).

The court of appeals concluded that this case was not controlled by the holding of *Knotts* but instead raised the very question *Knotts* expressly declined to resolve. *Id.* The court reached that conclusion because law enforcement "used the GPS device not to track Jones's 'movements from one place to another,' *Knotts*, 460 U.S. at 281, but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place to place." Pet. App. 21a-22a.

b. The court of appeals therefore considered the question left open in *Knotts*. *Id.* at 22a-38a.

Applying the two-step framework of *United States v. Katz*, 389 U.S. 347 (1967), the court first asked whether Jones had a subjective expectation of privacy. Pet. App. 16a, 22a-31a. The court held that he did. Unlike a person's "movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *Id.* at 22a-23a. Indeed, the government could point to no "single actual example of visual surveillance" of the same intrusiveness and duration as the GPS tracking in this case, *id.* at 35a, and "[n]o doubt the reason is that

practical considerations prevent visual surveillance from lasting very long," Pet. App. 36a.

In addition, "the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts." *Id.* at 22a-23a. In particular, extended 24-hour surveillance "reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *Id.* at 29a. "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person but all such facts." *Id.* at 30a.

In light of Jones's subjective expectation of privacy, the court turned the second step of the *Katz* framework and asked whether Jones's privacy expectation was reasonable. *Id.* at 32a-35a. The court found that it was. As the court explained, "prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse." *Id.* at 33a. In fact, the "intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*; indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under *Katz*." *Id.* at 33a.

The court of appeals also pointed out that California, Utah, Minnesota, Florida, South Carolina, Oklahoma, Hawaii, and Pennsylvania have all "enacted legislation imposing civil and criminal penalties for the use of electronic tracking devices and expressly requiring exclusion of evidence produced by such a device unless obtained by the police acting pursuant to a warrant." *Id.* at 33a-34a. These state laws, the court of appeals reasoned, "are indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable." *Id.*

The court of appeals emphasized that its holding was narrow. It explained that its decision did not conflict with the holdings of other federal courts of appeals. *Id.* at 20a-22a. In particular, the D.C. Circuit reaffirmed that "[s]urveillance that reveals only what is already exposed to the public—such as a person's movements during a single journey—is not a search." *Id.* at 35a. This case raised a different question, the court explained, because GPS devices produce an intrusive minute-by-minute profile of a person's patterns of movement that cannot feasibly be obtained through visual surveillance. *Id.* at 35a-37a. Hence the "advent of GPS technology has occasioned a heretofore unknown type of intrusion into an ordinary and hitherto privacy enclave." *Id.* at 36a-37a.

The court of appeals explicitly stated that "[t]his case does not require us to, and therefore we do not decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment."

Id. at 37a. Even if it were theoretically possible to obtain information of patterns of movement and habits through visual surveillance, that would not require a finding that prolonged 24-hour GPS tracking is not a search: "'The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.'" *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 35 n. 2 (2001)). As the court of appeals concluded, "when it comes to the Fourth Amendment, means do matter." *Id.*

c. Having found that the government's use of the GPS tracking device constituted a Fourth Amendment search on the particular facts of this case, the court of appeals next considered the government's argument that the automobile exception to the warrant requirement justified the warrantless use of the GPS device for a prolonged period. That argument, the court explained, was "doubly off the mark." Pet. App. 39a. First, "the Government did not raise it below," and the argument was therefore forfeited. *Id.* Second, "the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate." *Id.* And because the government made no other argument in defense of its warrantless search, the search was unreasonable. *Id.*

4. The D.C. Circuit denied the government's petition for rehearing *en banc*. *Id.* at 43a-52a.

a. In a short opinion concurring in the denial of rehearing en banc, Judges Ginsburg, Tatel, and Grif-

fith "underline[d] two matters." *Id.* at 44a. First, "because the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful." *Id.* The government's only argument was based on the automobile exception to the warrant requirement, and that exception did not apply. *Id.* Second, "the Government's petition complains that the court's opinion 'implicitly calls into question common and important practices such as sustained visual surveillance and photographic surveillance of public places,' Pet. at 2, but that is not correct." *Id.*

b. Chief Judge Sentelle wrote an opinion dissenting from the denial of rehearing en banc. Although GPS tracking devices do not merely aid visual surveillance, but make prolonged 24-hour surveillance possible for the first time, Chief Judge Sentelle nevertheless thought that this case should be controlled by the statement in *Knotts* that "'[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.'" Pet. App. 46a (quoting *Knotts*, 460 U.S. at 282). Chief Judge Sentelle also rejected the panel's distinction, foreshadowed in *Knotts*, between visual surveillance of discrete journeys and prolonged 24-hour GPS surveillance. In his view, "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." *Id.* at 47a-48a.

c. Judge Kavanaugh wrote a separate dissenting opinion from the denial of rehearing en banc. Although Judge Kavanaugh expressed agreement with Chief Judge Sentelle's opinion, he clarified that "[t]hat is not to say, however, that I think the Government necessarily would prevail in this case." Judge Kavanaugh would have considered en banc the question that "the panel opinion did not address": whether "the police's installation of a GPS device on one's car is an unauthorized physical encroachment within a constitutionally protected area." *Id.* at 49a, 52a (citation and internal quotation marks omitted). "In any event," Judge Kavanaugh concluded, "it is an important and close question, one that the en banc Court should consider along with the separate issue raised by Chief Judge Sentelle." *Id.* at 52a.

REASONS FOR DENYING THE PETITION

I. The D.C. Circuit's Holding That Prolonged 24-Hour GPS Surveillance Constitutes a Search Does Not Warrant Review

The advent of satellite-based tracking technology has enabled the government to engage in 24-hour tracking of the movements of any private citizen for extended—indeed, unlimited—periods of time. Courts across the country are only beginning to grapple with the Fourth Amendment implications of this powerful and fast-improving technology. And the Seventh, Eighth, and Ninth Circuits have recently held that use of GPS technology does not require a warrant where there was no dispute that the information recorded could have been obtained through visual surveillance. *See infra* pp. 19-23.

In this case, the D.C. Circuit did not consider whether the use of GPS technology is *always* a search, and it had no occasion to disagree with the holdings of the Seventh, Eighth, and Ninth Circuit. Instead, the D.C. Circuit, as the court itself explained, confronted a narrower question that had not previously been pressed before a federal court of appeals: whether law enforcement's 24-hour use of a GPS device over a prolonged period of time, and to an extent *not* feasible through visual surveillance, constituted a Fourth Amendment search. The court held that it did.

The government now urges this Court to grant review of the D.C. Circuit's decision. But the decision is in harmony with this Court's precedents; does not conflict with the decision of any other federal

court of appeals or any state high court; was carefully limited to its facts and thus does not threaten other well-accepted law enforcement techniques; correctly resolved the precise question presented; and could be affirmed on alternative grounds in any event. The government's petition for certiorari therefore should be denied.

A. The D.C. Circuit's Holding Does Not Conflict with This Court's Decisions In *Knotts* and *Karo*

The question in this case is highly fact-specific: whether the warrantless use of a satellite-based GPS tracking device to record a private citizen's movements in his vehicle, for 24 hours of every day for a prolonged period of time, constitutes a Fourth Amendment search in those instances in which it reveals patterns of movement and habits that could not have been obtained through mere visual surveillance. In resolving the question, the D.C. Circuit paid careful attention not only to the general guidance obtained from this Court's precedents but also to the particular facts of the case.

The government argues that this Court already resolved the question three decades ago in its decisions in *Knotts*, 460 U.S. 276, and *Karo*, 468 U.S. 705. *See* Pet. 13-16. And it asserts that this Court's review is warranted because the D.C. Circuit's holding is in tension or outright conflict with those decisions. The government's argument is incorrect.

1. This Court has never considered the Fourth Amendment implications of satellite-based GPS technology—which is unsurprising given that accu-

rate, non-degraded GPS transmissions were only made available for civilian use in 2000. *See supra* pp. 2-3. The government nonetheless argues that this Court's precedents are directly controlling. And it cites this Court's decisions in *Knotts* and *Karo*, in which the Court assessed the Fourth Amendment significance of beeper technology. The government's argument misconstrues the Court's precedents and fails to recognize the salience of the dramatic differences between beepers and GPS.

Both *Knotts* and *Karo* involved visual surveillance: the government in those cases actually observed the movements of the defendants on public thoroughfares. *See Knotts*, 460 U.S. at 278-79; *Karo*, 468 U.S. at 709-10. The issue was whether the government could, without obtaining a valid warrant, *facilitate* its visual surveillance through the use of beepers. Beepers are radio transmitters that emit periodic signals that can be picked up by a radio receiver. *Knotts*, 460 U.S. at 277. They do not enable the government to record an individual's movements automatically and remotely. To the contrary, they require the government to remain sufficiently nearby so as to pick up the radio signals. Thus, as the Court noted, beepers merely "augment[] the sensory faculties bestowed upon [the police] at birth." *Id.* The Court compared them to a "searchlight." *Id.* (citing *United States v. Lee*, 274 U.S. 559, 563 (1927)).

The Court ultimately held that the government did not need a warrant to facilitate its visual surveillance on public roads using beeper technology. It reached this result because the beepers merely aided

the government in tracking movements on public roads that "could have been observed by the naked eye." *Karo*, 468 U.S. at 713-14 (describing *Knotts*); *see also Knotts*, 460 U.S. at 281-82 ("When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property."); *id.* at 282 ("Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police."). As a consequence, the information was relinquished to public view, and there was no reasonable expectation of privacy. *Knotts*, 460 U.S. at 282-83; *Karo*, 468 U.S. at 719-21.

2. a. The government contends that *Knotts* and *Karo* created a bright-line rule that a private citizen can never have a reasonable expectation of privacy in his movements on public roads. *See* Pet. 13-14. But the opinions said no such thing. They were concerned with the facts before them, and thus held only that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements *from one place to another*." *Knotts*, 460 U.S. at 281 (emphasis added). Neither *Knotts* nor *Karo* resolved the question—which would have been purely hypothetical at the time—whether a person has a reasonable expectation of privacy in his minute-by-minute patterns of movement and habits over a prolonged period of time. In fact, *Knotts* explicitly reserved the question whether the Fourth Amendment tolerates "twenty-four hour sur-

veillance of any citizen of this country ... without judicial knowledge or supervision." *Knotts*, 460 U.S. at 283 (citation and internal quotation marks omitted).[2]

The 24-hour surveillance that this Court hypothesized in *Knotts* is now a reality in light of the advent of GPS technology. GPS devices make possible the minute-by-minute surveillance of an individual's movements for extended periods of time because they do not merely aid visual surveillance, but render visual surveillance unnecessary. Unlike a beeper that aids visual surveillance, or a searchlight that facilitates law enforcement's observations, a GPS device conducts the observations itself.

Given the limited nature of the holdings in *Knotts* and *Karo*, the dramatically different technology involved in those cases, and this Court's explicit statement in *Knotts* that it was deciding no more than necessary to resolve the issues actually raised, the D.C. Circuit properly viewed the question in this

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[2] The Court's refusal to resolve the question was particularly appropriate because, while the respondent in *Knotts* warned of the dangers of hypothetical 24-hour surveillance, he explicitly conceded at oral argument that the government did not engage in a search when it used the beeper technology to "assist surveillance" of his movements on public thoroughfares. *See* Tr. of Oral Arg. in *United States v. Knotts*, O.T. 1982, No. 81-1802, p. 40 ("We are submitting that the result which we seek in this case would not prevent the warrantless use of beepers only to assist surveillance which is generally the use to which beepers are put. Our only contention is that if there is a possibility that the item to which a beeper is attached on or installed in is likely to end up at a person's residence, then a warrant is required.").

case as an open one.

b. The government offers two other arguments based, alternatively, on *Knotts* and *Karo*, both of which are meritless.

First, the government insists that even if *Knotts* is distinguishable, the decision in *Karo* is not. Pet. 14-15. It observes that the government in *Karo* had engaged in "'months-long tracking' ... through 'visual and beeper surveillance,'" and yet "[t]he Court expressed no concern about the prolonged monitoring." *Id.* at 15. That argument fails. The government does not suggest that law enforcement in *Karo* had engaged in prolonged "twenty-four hour surveillance." *Knotts*, 460 U.S. at 283. And prior to the advent of GPS technology, it would have been practically impossible to do so for an extended period of time. *See supra* pp. 6-8. Accordingly, *Karo* plainly did not take up the issue that *Knotts* declined to resolve.

Second, the government argues that *Knotts* meant only to reserve the question of whether "mass, suspicionless GPS monitoring" would be permitted under the Fourth Amendment. Pet. 15. It draws that inference from *Knotts*'s use of the word "dragnet," which the government asserts "generally ... refer[s] to high-volume searches that are often conducted without any articulable suspicion." *Id.* And the government assures the Court that "[t]he GPS monitoring in this case was not 'dragnet' surveillance." *Id.* "Any constitutional questions about hypothetical programs of mass surveillance," the government submits, "can await resolution if they ever occur." *Id.* at 16.

That argument lacks merit. The government's arguments in this case would sanction "mass, suspicionless GPS monitoring." *Id.* at 15. After all, the D.C. Circuit did not prohibit prolonged GPS searches; it merely held that they *are* searches. And the government's principal contention is not that it should only be required to show reasonable suspicion before engaging in prolonged GPS tracking. Its argument is that GPS tracking of movements on public roads is *never* a search, and thus requires no explanation at all. *See id.* at 19-20 (agreeing with Chief Judge Sentelle that "'[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero,' and '[t]he sum of an infinite number of zero-value parts is also zero.'" (quoting Pet. App. 47a-48a). If accepted, that view would authorize "mass, suspicionless GPS monitoring." The government does not explain how the Court could conclude that prolonged use of GPS tracking is *not* a search when the government engages in prolonged 24-hour surveillance of one individual, but *is* a search when the government does the same to several individuals.[3]

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[3] It *might* be possible to hold that prolonged GPS tracking is a search, but that only reasonable suspicion is required. And the government does assert, in passing, that "[e]ven if [its GPS tracking] were (incorrectly) deemed a Fourth Amendment search, it would be a reasonable one." Pet. 15. The government failed to develop an evidentiary basis for this argument in the lower courts—indeed, it failed even to raise the argument—and the D.C. Circuit therefore refused to consider it. *See* Pet. App. 38a-39a (noting that the government on appeal had only argued that the automobile exception should apply,

The government's argument also fails because it misreads *Knotts*. As the D.C. Circuit persuasively explained, *id.* at 18a-20a, *Knotts* was not reserving a question of its own imagining. Instead, "[i]n reserving the 'dragnet' question, the Court was not only addressing but in part actually quoting the defendant's argument that, if a warrant is not required, then prolonged 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.'" *Id.* at 18a (quoting *Knotts*, 460 U.S. at 283); *compare* Br. of Resp. in *United States v. Knotts*, No. 81-1802, pp. 9-10. And "[t]he Court avoided the question whether prolonged 'twenty-four hour surveillance' was a search by limiting its holding to the facts of the case before it." *Id.* at 18a-19a (quoting *Knotts*, 460 U.S. at 283).

B. The D.C. Circuit's Holding Does Not Conflict with The Holding of Any Other Federal Court of Appeals

The government argues that this Court's review is warranted because the D.C. Circuit's opinion conflicts with decisions of the United States Courts of Appeals for the Seventh, Eighth, and Ninth Circuits. Pet. 20-23. That is incorrect. Not only is the D.C.

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and even that argument had not been raised in the district court); *see also id.* at 44a (Ginsburg, J., joined by Tatel, J., and Griffith, J., concurring in the denial of rehearing en banc) ("[B]ecause the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful."). It is therefore too late for the government to make the argument now.

Circuit's decision consistent with the rulings of other federal courts of appeals, but it is the first—and thus far the only—federal court of appeals decision to squarely consider the question left open in *Knotts*.

1. As the D.C. Circuit itself explained at length, Pet. App. 20a-22a, its decision does not directly conflict with the holding of any other federal court of appeals or state high court. At the time of the D.C. Circuit's decision, the Seventh, Eighth, and Ninth Circuits had upheld the government's warrantless use of a GPS device. *Id.* (citing *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010), *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), and *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007)).[4] But none of these courts of appeals was asked to address whether the government invades a reasonable expectation of privacy when it obtains information about patterns of movement and habits that would be infeasible to obtain through visual surveillance, as opposed to merely information about discrete journeys.

For example, the defendant in *Pineda-Moreno* did not ask the Ninth Circuit to resolve the question that *Knotts* expressly left open concerning the permissibility of 24-hour surveillance without a warrant. Instead, the defendant specifically "'acknowledged'" that *Knotts* was controlling, and merely argued that this Court's decision in *Kyllo*, 533 U.S. 27, had "'heavily modified the Fourth Amendment anal-

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[4] A small handful of state intermediate courts of appeal had also reached that result. *See* Pet. 22-23 n.4. Other state courts have reached the opposite result under state constitutions. *Id.* at 23 n.5.

ysis.'" Pet. App. 20a-21a (quoting *Pineda-Moreno*, 591 F.3d at 1216). The Ninth Circuit rejected that claim. Similarly, the defendant in *Garcia* "d[id] not contend that he ha[d] a reasonable expectation of privacy in the movements of his vehicle while equipped with the GPS tracking device," and rested his challenge "solely with whether the warrantless *installation* of the GPS device, in and of itself, violates the Fourth Amendment." *Id.* at 20a (quoting Br. of Appellant at 22 (No. 06-2741) (emphasis added)).

The defendant in *Marquez* likewise did not ask the Eighth Circuit to consider the question that this Court explicitly left open in *Knotts*. In fact, the defendant's opening brief in *Marquez* overlooked *Knotts* altogether, and when the government cited the case in its appellee brief, the defendant dropped the issue and did not argue the point further in his reply. *See* Br. of Appellant (No. 09-1743), *available at* 2009 WL 2058799; Reply Br. for Appellant, *available at* 2009 WL 4611117.

2. Given that the Seventh, Eighth, and Ninth Circuits had not been asked to consider the question this Court explicitly left open in *Knotts*, they should not be read as having resolved the question. As the D.C. Circuit explained, "[t]he federal circuits that have held use of a GPS device is not a search were not alert to the distinction drawn in *Knotts* between short-term and prolonged surveillance." Pet. App. 34a.

A recent Seventh Circuit decision confirms that there is no concrete conflict. Although the government argues that the Seventh Circuit's decision in

Garcia conflicts with the D.C. Circuit's decision, *see* Pet. 20, the Seventh Circuit does not agree with the government. In *United States v. Cuevas-Perez*, — F.3d—, No. 10-1473, 2011 WL 1585072 (7th Cir. Apr. 28, 2011), a divided panel acknowledged that the question considered in the present case remains an open question in the Seventh Circuit.

Judge Cudahy, the author of the Seventh Circuit's panel opinion, left for another day whether prolonged GPS surveillance could constitute a search, because he concluded that the limited GPS surveillance in that case did not raise the concerns that the D.C. Circuit had identified in the present case. *Id.* at *3. Judge Wood dissented, and argued that the D.C. Circuit's decision should have applied on the facts of the case. *Id.* at *13-22. And Judge Flaum, in a concurring opinion, argued that the D.C. Circuit's approach should be rejected, although even he acknowledged that "[t]here may be a colorable argument ... that the use of GPS technology to engage in long-term tracking is analogous to general warrants that the Fourth Amendment was designed to curtail, because of the technology's potential to be used arbitrarily or because it may alter the relationship between citizen and government in a way that is inimical to democratic society." *Id.* at *12. None of the judges on the panel thought that the Seventh Circuit's prior decisions had already held that GPS tracking could never be a Fourth Amendment search.

Just as the Seventh Circuit was willing to consider the issue reserved in *Knotts* once that issue was actually raised, the Eighth and Ninth Circuits

are presumably willing to do the same. That is particularly true because Fourth Amendment cases are extraordinarily fact-sensitive and generally should not be read to stand for more than they resolve. As this Court cautioned just a year ago, "[p]rudence counsels caution before the facts in [a single] case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010); *accord* Pet. App. 38a ("'Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations.'" (quoting *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 n.5 (1986)).

Because there is no genuine split of authority on the precise question raised in this case—much less an "intractable" conflict, Pet. 23—this Court's review is unwarranted.

C. The Government Has Identified No Persuasive Reason for This Court To Intervene Before a Circuit Split Has Developed

As explained, the D.C. Circuit's decision does not conflict with this Court's decisions or with the decision of any other federal court of appeals. Indeed, no other federal court of appeals or state high court has considered the precise argument presented in this case. And the government has identified no persuasive reason for this Court to intervene prematurely and before a circuit split develops. Indeed, there are several significant reasons for the Court to decline review and to allow for additional consideration in the lower courts.

1. a. This Court has recognized that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Quon*, 130 S. Ct. at 2629 (noting that although the Court initially held that wiretaps were not a search, it eventually overruled that conclusion). That caution is uniquely applicable here.

To begin with, the D.C. Circuit was the first federal court of appeals in the country to consider whether the government engages in a Fourth Amendment search when it uses a GPS device to obtain patterns of movement that could not feasibly be obtained through visual surveillance. Because the question presented is not only legally but also technologically complex, "further consideration of the ... problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting the denial of the petitions for writs of certiorari). If the Court were instead to grant review of the technologically complex question without the benefit of a fully developed split of authority in the courts below, the risks of judicial error would be magnified.

The risk of error is of substantial concern. GPS technology is "surely capable of abuses fit for a dystopian novel." *Cuevas-Perez*, 2011 WL 1585072, at *4; *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("1984 may have come a bit later than predicted, but it's here at

last."); *id.* at 1126 ("There is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of deja vu."). In fact, the technology has already "occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave." Pet. App. 37a. Should the Court mistakenly conclude that the Fourth Amendment plays no role in restraining the use of GPS technology, that error may well be "dire and irreversible." *Pineda-Moreno*, 617 F.3d at 1126 (Kozinski, J., dissenting from the denial of rehearing en banc).

That is particularly true because whatever Fourth Amendment rule the Court ultimately adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. And while GPS is already a powerful technology, "the current state of the technology is constantly being enhanced." Hutchins, *supra*, at 420. For instance, "GPS products are in development that will be small enough to implant under the human skin." *Id.* at 421.

b. Premature review is also unwarranted because the question whether prolonged GPS tracking constitutes a search cannot meaningfully be reviewed in isolation.

In the court of appeals, Jones presented an alternative Fourth Amendment argument: that the warrantless *installation* of the GPS device on his vehicle was itself a violation of the Fourth Amendment, even if the subsequent *use* of the device was not. As Judge Kavanaugh explained, this alternative argu-

ment raises "an important and close question." *See* Pet. App. 49a-52a.[5] It is also antecedent to the question on which the government seeks review: if the installation of the GPS device did require a warrant, then the question whether the use of a GPS device is a Fourth Amendment search would be of little consequence. For those reasons, the questions should either be considered together, or not at all. *See id.* (Kavanaugh, J.) (recommending that the en banc Court consider both questions jointly).

But while Jones preserved this antecedent question, the D.C. Circuit did not resolve it. The court of appeals agreed with Jones that prolonged use of the GPS device constituted a search, and therefore declined to review the permissibility of the warrantless installation. The existence of this unresolved and antecedent question presents a further reason to deny the petition for certiorari.

2. At the same time, the government identifies no persuasive reason for this Court to intervene prematurely. And no persuasive reason exists, because the D.C. Circuit's narrow holding does not forbid extended 24-hour GPS tracking, but merely requires the government to obtain a warrant or else show that the warrantless search was nonetheless reasonable.

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[5] In *Karo*, this Court held that the government did not engage in a search by placing a beeper in a container *before* an individual purchased it. 468 U.S. at 716-18. This case raises a significantly different question: whether it is a search to trespass on property that already belongs to an individual. *See* Pet. App. 49a-52a.

To be sure, the government suggests it may be burdensome to obtain a warrant. Pet. 24. But the government is poorly positioned to argue that obtaining a warrant is highly burdensome, given the ease with which it obtained a warrant in this case. *See* Pet. App. 15a-16a, 38a-39a; *accord Karo*, 468 U.S. at 718 ("[T]his is not a particularly attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained in this case, seemingly on probable cause."). The government's argument is further weakened by the fact that it appears to have a policy in favor of obtaining warrants before seeking to acquire location data. *See In re United States ex rel. Historical Cell Site Data*, 747 F. Supp. 2d 827 n.70 (S.D. Tex. 2010) (citing e-mail from Mark Eckenwiler, Assoc. Dir., Office of Enforcement Operations, Criminal Division, United States Department of Justice, to unknown recipients (Nov. 16, 2007), *available at* http://www.aclu.org/pdfs/freespeech/cellfoia_release_crm200800549f_20080822).

The government also asserts that it sometimes uses GPS tracking devices *before* it has probable cause in order to establish probable cause for a warrant. Pet. 24-25. But the limited scope of the D.C. Circuit's ruling significantly weakens the force of that argument. To begin with, the ruling does not treat all uses of GPS tracking devices as Fourth Amendment searches. Law enforcement may still use GPS tracking devices to determine where an individual travels on discrete journeys or trips. Furthermore, the D.C. Circuit's holding does not preclude the government from using a GPS tracking device for periods of tracking that could feasibly have

been conducted through visual surveillance instead. The D.C. Circuit merely held that the government engages in a Fourth Amendment search when it conducts 24-hour GPS tracking for an *extended* period of time, beyond what is feasible through visual surveillance, and to an extent that allows the recording of patterns of movement. And even then, the D.C. Circuit did not rule out the possibility that reasonable suspicion might suffice for a GPS search in a future case; the government simply failed to develop or preserve that issue in this case. *See supra* n.3.

The government also contends generally that the D.C. Circuit's ruling threatens to "destabilize Fourth Amendment law." Pet. 25. That is incorrect. The D.C. Circuit carefully limited its holding to prolonged GPS searches, and explicitly stated that its ruling would not apply beyond the precise facts and issues presented. Pet. App. 35a-38a; *see also id.* at 44a. And the D.C. Circuit's decision does not call into question the aggregation of data relinquished to public view. *But see* Pet. 25. It merely recognizes that when a GPS device is used to record patterns of movement in a manner not practically feasible through visual surveillance, it records information that *has not* been relinquished to public view.

In any event, should the D.C. Circuit's decision ever be applied out of context to invalidate a well-established law enforcement investigative technique, as the government suggests it might, there will be time enough to review that case when it arises.

D. The D.C. Circuit's Holding Is Correct

This Court's review is unwarranted for the additional reason that the D.C. Circuit's holding is correct. The D.C. Circuit properly applied this Court's precedents in determining that prolonged GPS tracking can constitute a Fourth Amendment search.

1. The D.C. Circuit correctly recognized that prolonged use of GPS devices allows the government to record information that cannot practically be obtained through visual surveillance. Accordingly, although an individual's discrete travels on public roads may be readily observable by the naked eye, the same cannot be said of an individual's long-term pattern of movement and stops.

Moreover, the D.C. Circuit was correct to hold that pattern information is dramatically more intrusive than mere information about an individual's discrete journeys. *See* Pet. App. 22a-37a. Indeed, the distinction between discrete bits of information and patterns of conduct is well-accepted. The government itself often invokes the argument in foreign-intelligence cases. *See, e.g.*, *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (agreeing that the "mosaic-like nature of intelligence gathering" requires taking a "broad view" in order to contextualize information (internal citations and quotations omitted)); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."). In fact, the government often relies on a whole-is-more-

revealing-than-its-parts theory when seeking to establish probable cause for a warrant. *See, e.g.*, *United States v. McDuffy*, No. 10-1022, 2011 U.S. App. LEXIS 7054, at *6 (7th Cir. Apr. 7, 2011) (affirming denial of motion to suppress based on the view that "[e]ach individual detail in the affidavit would not have been sufficient by itself to support a finding of probable cause, but the details were mutually reinforcing," and "[t]he whole was greater than the sum of the individual details"); *United States v. Muniz-Melchor*, 894 F.2d 1430, 1438 (5th Cir. 1990) (facts in their interrelated context may reinforce each other, "so that the laminated total may indeed be greater than the sum of its parts"); *United States v. Ramirez-Cifuentes*, 682 F.2d 337, 342 (2d Cir. 1982) ("[W]e view the whole mosaic rather than each tile.").

2. The government takes issue with the D.C. Circuit's reliance on its determination (which remains unchallenged) that prolonged 24-hour visual surveillance is practically impossible. Pet. 16-20. According to the government, "[t]his Court's cases lend no support to the court of appeals' view that public movements can acquire Fourth Amendment protection based on the lack of 'likelihood' that anyone will observe them." Pet. 16. The government's argument conflates what is possible with what is likely, and in any event fails on its own terms.

a. As an initial matter, the government's argument that "the Court has never engaged in a 'likelihood' analysis for cases involving visual surveillance of public movements," Pet. 17, is beside the point. The D.C. Circuit did not rest its conclusion on a find-

ing that prolonged 24-hour surveillance is *unlikely*. It expressly found that extended minute-by-minute surveillance is not a practical possibility: "The likelihood a stranger would observe all those movements is not just remote, *it is essentially nil*." Pet. App. 26a (emphasis added); *see also id.* at 35a-36a ("[P]ractical considerations prevent visual surveillance from lasting very long."). The D.C. Circuit therefore concluded that a person does not actually or constructively expose her pattern of movements to public observation. That conclusion was correct.

b. The government's argument also fails on its own terms. Contrary to the government's assertion, this Court's precedents clearly call for a "likelihood" inquiry in determining whether information has been exposed to the public. In *Bond v. United States*, 529 U.S. 334 (2000), for example, the Court found that police officers committed a search when they squeezed the outside of a bus passenger's carry-on luggage and discovered drugs. The Court reasoned that "[w]hen a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another," but he "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-39. That analysis applies here: even if an individual may expect that his discrete journeys will be observed, he does not expect that his movements will be tracked 24 hours a day for an extended period of time.

The government responds that *Bond* is limited to cases involving "tactile observation." Pet. 16. But nothing in *Bond* supports that limit. Although the

Court noted that the case involved tactile rather than visual observation, it noted that distinction only to explain why the bus passenger had not "lost a reasonable expectation that his bag would not be physically manipulated" simply by virtue of his having "expos[ed] his bag to the public." *Bond*, 529 U.S. at 337. The relevant inquiry continued to be whether a reasonable expectation of privacy existed. *Id.* at 338. And the Court answered it by determining what types of intrusions are likely to occur. *Id.*

Even if the government were correct that *Bond* is solely a "tactile" case, this Court's "flyover" cases would apply in any event, and they provide for the very "likelihood" analysis the government now criticizes. *See* Pet. 18 (acknowledging that *California v. Ciraolo*, 476 U.S. 207 (1986), and *Florida v. Riley*, 488 U.S. 445 (1989), employ a "likelihood" analysis). The government counters that the flyover cases apply only to "visual inspections of private areas (the curtilage of homes), not public movements." *Id.* But this Court's decisions did not recognize that distinction, and it would be inconsistent with *Katz*, 389 U.S. at 351, which protects reasonable expectations of privacy regardless of whether they are in "private areas."

* * * * *

This Court's precedents—from *Katz* to *Bond* and the flyover cases—all support the D.C. Circuit's approach to prolonged 24-hour GPS tracking. Because the D.C. Circuit's decision is in harmony with this Court's precedents, review is not warranted.

II. If The Court Grants The Government's Petition for Certiorari, It Should also Decide Whether Warrantless Installation of a GPS Device Violates The Fourth Amendment

As noted, if the Court does grant the government's petition, it should also grant review of the alternative argument Jones raised in the D.C. Circuit, and that the court had no occasion to resolve: whether the installation of the GPS device on Jones's vehicle was itself a violation of the Fourth Amendment. This "property-based Fourth Amendment argument" raises "an important and close question." Pet. App. 50a, 52a (Kavanaugh, J.). And it is antecedent to the question on which the government seeks review. *See supra* pp. 25-26.

The Fourth Amendment "'protects property as well as privacy.'" Pet. App. 50a (Kavanaugh, J.) (quoting *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992)). In this case, "the police not only engaged in surveillance by GPS but also intruded (albeit briefly and slightly) on the defendant's personal property, namely his car, to install the GPS device on the vehicle." *Id.* Just as "squeezing [the] outer surface of a bag" constitutes a Fourth Amendment search, *id.* at 51a (citing *Bond*, 529 U.S. 334), the government's installation of a device on Jones's private vehicle constitutes a search. *See id.* at 52a (Kavanaugh, J.) (noting the argument that "[a]bsent the police's compliance with Fourth Amendment requirements, 'people are entitled to keep police officers' hands and tools off their vehicles'" (quoting *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Klein-

feld, J., concurring)); *but see McIver*, 186 F.3d at 1126-27 (reaching the erroneous conclusion that because there is no reasonable expectation of privacy in preventing a *visual inspection* of the exterior of a car, there cannot be a reasonable expectation of privacy in preventing physical trespasses).

To be sure, the D.C. Circuit did not consider this alternative ground, because it agreed with Jones that the extended use of the GPS device constituted a search. But as noted, *supra* pp. 25-26, the fact that the D.C. Circuit has not resolved the question presents no reason to deny review of the question; it is if anything a reason to deny review of the entire case. If the Court nonetheless grants the petition for certiorari, then the Court should consider both questions together, as Judge Kavanaugh urged his colleagues on the D.C. Circuit to do. Pet. App. 52a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 7, 2011

REPLY BRIEF

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 10-1259

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The court of appeals' decision leaves law enforcement officers with no practical guidance about when a warrant is required to monitor a vehicle on public roads using a GPS device and creates a circuit split on that question. Until this Court intervenes, law enforcement officers will be deprived of an important tool for investigating leads and tips on drug trafficking, terrorism, and other crimes. Respondent's arguments against granting review are unpersuasive.

A. The Question Presented Warrants Immediate Review

1. Respondent's brief in opposition only serves to highlight the need for this Court to provide practical guidance about when a warrant is required before officers may use a GPS device to monitor a vehicle's public movements. In an attempt to minimize the detrimental effect that the court of appeals' decision will have on criminal investigations, respondent characterizes the decision as "merely [holding]

that the government engages in a Fourth Amendment search when it conducts 24-hour GPS tracking for an extended period of time, beyond what is feasible through visual surveillance, and to an extent that allows the recording of patterns of movement." Br. in Opp. 28 (emphasis omitted). No workable standard can be derived from that "holding."

The court of appeals gives no guidance about how long between a few hours and 28 days constitutes "an extended period of time."[1] Nor is it possible to determine the point at which an investigation would cease to be "feasible through visual surveillance." The feasibility of visual surveillance in any given case would depend on the importance of the target relative to the resources of the law enforcement agency conducting the surveillance.[2] And law enforcement officers could not always be expected to know, especially at the outset of an investigation, whether the vehicle's future movements will "allow[] the recording of patterns," or whether the vehicle is about to embark on discrete journeys.

Unless this Court intervenes, the court of appeals' decision will curtail law enforcement's ability to use this impor-

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[1] Respondent contends (Br. in Opp. 4) that officers in this case could not rely on the warrant they had obtained in part because the officers "decided to use the GPS device to record [respondent's] movements * * * for four weeks," which was "far beyond the ten days that had been authorized under the expired warrant." That is incorrect. Although the officers did not comply with the warrant's restrictions on installation (Pet. 3), the warrant authorized the officers to leave the device in place for 90 days. See 1:05-cr-00386-ESH Docket entry No. 150-1, at 2 (D.D.C. July 23, 2006).

[2] For example, agents from the Federal Bureau of Investigation followed terrorism suspect Najibullah Zazi as he drove 1,800 miles from Denver to New York, often reaching speeds of over 100 miles per hour. See David Johnston & William Rashbaum, *Rush for Clues Before Charges In Terrorism Case*, N.Y. Times, Oct. 1, 2009, at A1, A30.

tant investigatory tool. As the petition explains (Pet. 24), federal law enforcement agencies frequently use tracking devices to follow leads and tips before suspicions have ripened into probable cause and without a clear idea of how long it will take to gather useful information. The court of appeals' decision will effectively require law enforcement officers to obtain a warrant before placing a GPS monitor on a vehicle in many scenarios, which will seriously impede criminal investigations.

2. Respondent further contends (Br. in Opp. 28), that the court of appeals' decision will not call into question other common investigatory practices because the court "explicitly stated that its ruling would not apply beyond the precise facts and issues presented." To the contrary, the court explicitly left open the question whether its aggregation theory would apply to prolonged visual surveillance. Pet. App. 38a ("[W]e reserve the lawfulness of prolonged visual surveillance"). Many other non-search investigatory practices such as protracted use of pen registers, repeated trash pulls, and aggregation of financial data can likewise reveal immense amounts of information about a person's life. Pet. 25-26. The court of appeals offers no reason why its aggregation theory would not undermine those investigatory practices. Neither does respondent.

3. Notwithstanding the lack of practical guidance and the potential for the court's decision to destabilize Fourth Amendment law, respondent contends (Br. in Opp. 24-25) that this Court's review of the question presented would be premature because GPS technology is "technologically complex" and its role in society is still emerging. That argument is unpersuasive. GPS devices use ascertainable technology that performs the same function as the beeper technology that this Court has previously considered in *United States* v. *Knotts*, 460 U.S. 276 (1983), and *United States* v.

Karo, 468 U.S. 705 (1984)—they monitor a vehicle's movements on public roads. As explained in the petition (Pet. 13-14), the enhanced accuracy of GPS technology does not change the analysis.

Nor does the potential future development of "GPS products * * * that will be small enough to implant under the human skin" (Br. in Opp. 25) counsel against review. Monitoring a person's movements through a device implanted in the body raises serious constitutional questions that are far beyond the scope of the question presented, which is clearly limited to GPS tracking of respondent's vehicle on public roads. Pet. I. Future developments in GPS technology do not provide a compelling reason for this Court to withhold guidance on a present-day technology applied in a recurring fact pattern.

B. The Decision Below Creates A Circuit Conflict

Respondent contends (Br. in Opp. 19-23) that the decision below does not conflict with decisions of the Seventh, Eighth, and Ninth Circuits because those courts did not consider 24-hour GPS monitoring over a prolonged period, to an extent not feasible by visual surveillance, and that revealed information about the subject's patterns. *Id.* at 20. The facts and holdings of those cases, however, refute respondent's efforts to distinguish them.

1. In *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. pending, No. 10-7515 (filed Nov. 10, 2010), agents from the Drug Enforcement Administration monitored the defendant's vehicle with various tracking devices "[o]ver a four-month period," and the devices revealed that the defendant repeatedly traveled to a suspected marijuana grow site. *Id.* at 1213. The Ninth Circuit thus considered pro-

longed GPS monitoring, for a period that respondent argues would not be feasible by visual surveillance, that revealed information about the defendant's patterns, and the court held that no search had occurred. *Id.* at 1216-1217.

Respondent contends (Br. in Opp. 20) that the defendant in *Pineda-Moreno* "'acknowledged' that *Knotts* was controlling," but that is incorrect. Pineda-Moreno acknowledged the holding of *Knotts*, see 591 F.3d at 1216, but he argued that "*Knotts* should not control his case," because (he asserted) the use of GPS technology to obtain information beyond what the general public could observe constituted a search under the Fourth Amendment. *Ibid.* The question presented in Pineda-Moreno's petition for certiorari is the same question presented in this case. See Pet. at i, *Pineda-Moreno*, *supra* (No. 10-7515). And the Ninth Circuit's holding that the months-long tracking of the defendant's vehicle was not a search because "[t]he only information the agents obtained from the tracking devices was * * * information the agents could have obtained by following the car," 591 F.3d at 1216, leaves no room for future panels to hold that prolonged monitoring constitutes a search if it reveals anything more than information about a discrete journey.

2. Respondent's attempt to minimize the conflict with the Eighth Circuit's decision in *United States* v. *Marquez*, 605 F.3d 604 (2010), is also unpersuasive. The Eighth Circuit's holding in *Marquez* is admittedly narrower than *Pineda-Moreno*'s holding. See *id.* at 610 (holding that "when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking

device on it for a reasonable period of time").[3] But respondent erroneously suggests (Br. in Opp. 20) that the Eighth Circuit might decide future cases differently if they involved more than "information about discrete journeys." The Eighth Circuit was clearly informed that agents had been tracking the defendant's vehicle for five months, see Gov't C.A. Br. 4-8, *Marquez*, *supra* (No. 09-1743), and the court nevertheless concluded that the monitoring had remained within "a reasonable period of time." 605 F.3d at 610.

3. Respondent correctly points out (Br. in Opp. 21-22) that in a case decided after the petition was filed, the Seventh Circuit has stated that its previous panel decision in *United States* v. *Garcia*, 474 F.3d 994, cert. denied, 552 U.S. 883 (2007), would not necessarily control in a case where GPS surveillance of a vehicle was "lengthy" and exposed "the twists and turns of [the sub-

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[3] Respondent acknowledges (Br. in Opp. 18 n.3) that it would be possible for this Court to hold "that prolonged GPS tracking is a search, but that only reasonable suspicion is required" for the search to be reasonable. Respondent contends, however, that the government "failed to develop an evidentiary basis for this argument" and that it is "too late for the government to make the argument now." *Ibid.*; *id.* at 28. The record in this case demonstrates that the officers not only had reasonable suspicion that respondent was involved in criminal activity, their suspicion was supported by probable cause. See Pet. App. 15a-16a, 38a-39a n.* (noting that officers had obtained a warrant). Moreover, this Court has previously held that a search based on reasonable suspicion was reasonable under the Fourth Amendment, even when the government defended the search on other grounds. See, *e.g.*, *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001) (noting that the government defended search of probationer's home on the theory that probationer consented to the search as a condition of probation, but upholding search instead on the theory that search of a probationer's home is reasonable under the totality of the circumstances if it is based on reasonable suspicion).

ject's] life." *United States* v. *Cuevas-Perez*, No. 10-1473, 2011 WL 1585072, at *3 (Apr. 28, 2011) (opinion of Cudahy, J.). Although *Cuevas-Perez* eliminates a conflict with the Seventh Circuit, the decision also highlights the need for this Court's intervention.

In *Cuevas-Perez*, federal agents tracked the defendant's vehicle using a GPS device for 60 hours as it traveled from Arizona to Illinois. Those facts produced three separate opinions that reached different conclusions about whether that monitoring constituted a search. Judge Cudahy left open the possibility that prolonged monitoring could become a Fourth Amendment search if it was sufficiently lengthy to expose "the twists and turns of [the subject's] life," but he concluded that the 60-hour GPS surveillance of the defendant's vehicle was not sufficiently lengthy to constitute a search. *Cuervas-Perez*, No. 10-1473, 2011 WL 1585072, at *3. In a concurring opinion, Chief Judge Flaum also concluded that no search had occurred, but he did so on the grounds that GPS monitoring of a vehicle's public movements "falls squarely within the Court's consistent teaching that people do not have a legitimate expectation of privacy in that which they reveal to third parties." *Id.* at *4. Chief Judge Flaum explained that in holding otherwise, the D.C. Circuit had "construct[ed] a framework for analyzing GPS monitoring based on an unsound constitutional foundation." *Ibid.* And Judge Wood, in a dissenting opinion, not only endorsed the D.C. Circuit's holding in this case, *id.* at *13, but she also concluded that the 60-hour surveillance of the defendant's trip from Arizona to Illinois was sufficiently lengthy to constitute a search, *id.* at *20. The three opinions in *Cuevas-Perez* make clear that this Court's intervention is necessary not only to provide much-

needed guidance to law enforcement officers, *supra* pp. 1-4, but also to provide guidance to the lower courts.

C. The Decision Below Is Incorrect

Respondent's contentions (Br. in Opp. 13-19, 29-32) that the D.C. Circuit's decision is correct should not affect whether the Court grants certiorari to resolve a circuit conflict on an important question of federal law. In any event, respondent's defense of the court of appeals' decision is unpersuasive.

Respondent attempts (Br. in Opp. 13-19) to distinguish *Knotts* and *Karo* on the grounds that the government in those cases "actually observed the movements of the defendants on public thoroughfares." *Id.* at 14. Although that may be true of the investigation in *Knotts*, where the defendant drove 100 miles from Minnesota to Wisconsin, 460 U.S. at 277,[4] it is incorrect with respect to *Karo*. In *Karo*, agents placed a tracking device in a can of ether and left it there for five months as the can was transported between different locations. 468 U.S. at 708-710. Officers did not conduct visual surveillance of the can during the entire five months; they used the beeper at various points to locate the can as it was moved to different locations. *Ibid.*

If respondent's argument is that some visual surveillance during prolonged electronic monitoring ensures that use of an electronic tracking device would not be a search, that theory would also apply here. The GPS device that officers used to track respondent's vehicle did not transmit data 24 hours a day; the device was in "sleeping mode" whenever the vehicle was not moving.

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[4] In *Knotts*, the officers ceased visual surveillance after the subject "began making evasive maneuvers," and they resumed surveillance an hour later after using the beeper to locate the vehicle. 460 U.S. at 278.

Gov't C.A. App. 68-70. And respondent's presence at the stash house where officers seized most of the evidence presented at respondent's trial was also established by visual surveillance, including videotape and photographs of respondent driving to and from that location. *Id.* at 75-76, 145-147; Resp. C.A. App. 844. But the Court's holdings in *Knotts* and *Karo* were not based on police officers' use of beepers to supplement visual surveillance. Those decisions were based on the principle that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281; *id.* at 281-282 (movements were "voluntarily conveyed to anyone who wanted to look"); *Karo*, 468 U.S. at 713-714 (beeper revealed only information that "could have been observed by the naked eye").

Respondent's further contention (Br. in Opp. 31-32) that *Bond* v. *United States*, 529 U.S. 334 (2000), and the flyover cases, see *California* v. *Ciraolo*, 476 U.S. 207 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989), provide support for the court of appeals' "likelihood" analysis rests on a misunderstanding of those opinions. In those cases, the Court considered the defendant's expectations about whether someone would manipulate his luggage or peer into his backyard to determine whether the defendant had effectively exposed a private item or area to public view. Pet. 17-18. In contrast, the movements of respondent's vehicle were clearly exposed to the public. See *Knotts*, 460 U.S. at 285.

D. The Court Should Not Review The Additional Question Presented By Respondent

Finally, respondent contends (Br. in Opp. 33-34) that if the Court grants the petition, it should also review

another question presented by respondent in the court of appeals, which the court did not address: whether the installation of a GPS device on respondent's vehicle violated the Fourth Amendment. This Court does not ordinarily review questions that were not specifically decided by the court of appeals, see, *e.g.*, *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982), and there is no reason to do so here.

The courts of appeals are not in disagreement about whether the installation of an electronic monitoring device on a vehicle constitutes a Fourth Amendment search or seizure. Respondent does not contend otherwise. The only authority respondent cites in support of his position is Judge Kleinfeld's concurring opinion in *United States* v. *McIver*, 186 F.3d 1119 (9th Cir. 1999), which concludes that installation of a GPS device on an automobile is a Fourth Amendment seizure. *Id.* at 1133. The majority in *McIver*, however, concluded that installation is not a seizure because it does not "meaningfully interfere" with the owner's possessory interest in his vehicle. *Id.* at 1126-1127. The other courts of appeals that have considered this question agree that installation of a GPS device does not violate the Fourth Amendment. *Garcia*, 474 F.3d at 997; *Marquez*, 605 F.3d at 610.

Respondent contends (Br. in Opp. 25-26) that the question presented "cannot meaningfully be reviewed" without also considering whether the installation was a search, but that is not the case. If the Court were to grant certiorari and reverse with respect to whether prolonged GPS monitoring constitutes a search, the court of appeals could consider on remand petitioner's alternative argument that installation of the GPS device violated the Fourth Amendment. See, *e.g.*, *Kentucky* v.

King, No. 09-1282 (May 16, 2011), slip op. 17 (reversing court of appeals' judgment with respect to whether officers may rely on a foreseeable exigency to justify warrantless entry, and stating that preliminary question of whether exigency existed "is better addressed * * * on remand").

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JUNE 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

MAY 16 2011

No. 10-1259

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

ANTOINE JONES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, INSTITUTE ON THE CONSTITUTION, RESTORING LIBERTY ACTION COMMITTEE, U.S. JUSTICE FOUNDATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., DOWNSIZEDC.ORG, DOWNSIZE DC FOUNDATION, AND LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici*, Gun Owners of America, Inc., Gun Owners Foundation, Institute on the Constitution, Restoring Liberty Action Committee, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., DownsizeDC.org, and Downsize DC Foundation, the Lincoln Institute are educational organizations interested in the proper interpretation of the U.S. Constitution, most of whom have filed numerous *amicus curiae* briefs in prior litigation, including cases in this Court.

SUMMARY OF ARGUMENT

The Government's petition should be granted, but not for the reasons stated therein. Instead, the petition should be granted to resolve a split among the circuits on the Fourth Amendment's relevance and application to covert installations of global positioning systems ("GPS") on an American citizen's automobile by restoring the Fourth Amendment to its original text and purpose. The conflict among the circuits over the constitutionality of the installation of GPS is a product of this Court's rejection of a property-based Fourth Amendment jurisprudence — embraced initially by a

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

unanimous Court in Boyd v. United States, 116 U.S. 616 (1886), and adhered to for over 80 years — substituting therefor a new rationale based upon an emerging right of privacy by a vote of only five justices in Warden v. Hayden, 387 U.S. 294 (1967).

Relying on the Hayden rationale — that the Government may search and seize any person, place or thing if there is no reasonable expectation of privacy — the Government contends that the installation of a GPS on an automobile to gather information of the vehicle's movement on a public road was not even governed by the Fourth Amendment. Under the Boyd rule, the GPS installation would have been barred by the "mere evidence" rule, the Government having no property interest in the GPS data sought, namely, the automobile's movements. By rejecting the "mere evidence" rule in favor of a "privacy" rationale, Hayden (i) disregards the textual meaning of the Fourth Amendment's absolute prohibition against "unreasonable searches and seizures" that violated a person's common law property rights; (ii) undermines the Fourth Amendment's warrant requirement, having opened the door to general searches without probable cause, such as GPS monitoring; and (iii) weakens the Fifth Amendment's privilege against self-incrimination. Moreover, the Hayden approach to the Fourth Amendment invites open-ended judicial balancing of law enforcement interests against individual liberty in derogation of the sovereignty of the people.

ARGUMENT

I. THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS BY RESTORING THE FOURTH AMENDMENT TO ITS ORIGINAL TEXT AND PURPOSE.

These *amici curiae* file this brief in support of the Government's Petition for a Writ of Certiorari, but reject the Government's position that the covert installation of a global positioning system ("GPS") on an American citizen's automobile is not subject to the Fourth Amendment. These *amici* believe that the Government's position is erroneous, but not because such installation in this case violated defendant's "reasonable expectation of privacy," as held by the Circuit Court of Appeals below.

Rather, the petition should be granted because this and other recent cases involving GPS tracking devices demonstrate the complete inadequacy of current Fourth Amendment precedent to protect the inviolate "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Although there exists a significant conflict among the circuits regarding these GPS tracking devices which must be resolved, none of the circuits have based their opinion on a textual analysis of the Fourth Amendment, relying instead on Supreme Court decisions which have diverged from the constitutional text for over 40 years. As such, this case presents to this Court a historic opportunity to

reconsider the rationale for its current Fourth Amendment jurisprudence based upon reasonable privacy expectations, and to restore its earlier Fourth Amendment jurisprudence based upon protecting both the sanctity of private property and the civil sovereignty of the people. *Compare* Warden v. Hayden, 387 U.S. 294 (1967) and Katz v. United States, 389 U.S. 347 (1967) *with* Boyd v. United States, 116 U.S. 616 (1886) and Gouled v. United States, 255 U.S. 298 (1921).

The Government's petition for certiorari is based upon what it views to be "confusing or inconsistent case law with respect to GPS tracking or other means of acquiring or aggregating data not normally thought of as a search [that] will hamper important law enforcement interests." Petition for Certiorari ("Pet."), p. 27. However, the Government seeks to further erode the Fourth Amendment. Relying on the premise that the Fourth Amendment protects only "reasonable expectation[s] of privacy," the Government hopes to convince this Court that, unless it is granted immunity from Fourth Amendment constraints upon the use of GPS monitoring, its ability to investigate crimes will be seriously impaired. *See* Pet., pp. 24-25. By parading a litany of law enforcement needs,[2] the

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[2] According to the Government, the rule laid down by the Court of Appeals below would: (a) "**stifle** the ability of law enforcement agents to follow leads at the beginning stages of an investigation"; (b) "**provide no guidance** to law enforcement officers about when a warrant is required before placing a GPS device on a vehicle"; and (c) "**call into question** the legality of various investigative techniques used to gather public information." Pet., p. 24 (emphasis added). Furthermore, the Government complains

Government seeks to shed any principled constraint imposed on it by the Fourth Amendment — hoping to lay the groundwork to persuade judges in future cases that a defendant's individual expectation of privacy is unreasonable when balanced against the interest of society to be protected against drug "traffick[ers], terrorist[s], and other crim[inals]." *See* Pet. p. 24.

This Court recently held in District of Columbia v. Heller, 554 U.S. 570 (2008) that "a constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.*, 554 U.S. at 634. But the Fourth Amendment's "reasonable expectation of privacy" test increasingly invites just such a judicial "freestanding 'interest-balancing' approach,"[3] as the litigation herein demonstrates. *Compare* Circuit Judge Ginsburg's analysis of the privacy issue (App. 26a-39a) *with* the analyses of Chief Judge Sentelle (App. 45a-49a), Circuit Judge Kavanaugh (App. 45a-52a), and District Court Judge Huvelle (App. 83a-85a).

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that to require "a warrant before placing a GPS device on a vehicle used for a 'prolonged' time period, has created **uncertainty** surrounding the use of an **important** law enforcement tool." *Id.* (emphasis added). Finally, the Government argues that "the court of appeals' legal theory that the aggregation of public information constitutes a Fourth Amendment search, even when short periods of surveillance would not, has the potential to **destabilize** Fourth Amendment law and to raise questions about a variety of **common** law enforcement practices." Pet., p. 25 (emphasis added).

[3] See Heller, 554 U.S. at 634.

To be sure, the Fourth Amendment prohibition is directed at "unreasonable" searches and seizures, but the meaning of "unreasonable" is contextual and unique — different from the meaning of that word as applied by juries to contending parties in tort cases, or by judges in suits for an injunction, where competing interests may be properly balanced *ad hoc*. Rather, the Fourth Amendment's meaning of "unreasonable" was designed as an objective, fixed rule to govern the relationship between the Government and its citizens — a direct product of specific historic events involving the abusive exercise of government power against the liberty and property of individual citizens. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 313-21 (1967) (Douglas, J., dissenting). As the Heller Court has reminded us, "[t]he very enumeration of the right takes out of the hands of Government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." Heller, 554 U.S. at 634. In short, there is no judicial balancing to be done — as the Fourth Amendment, like the Second and the First, "is the very product of an interest-balancing by the people." *See id.*

Even though the Court of Appeals below reached the right result — exclusion of the data produced by the Government-installed GPS system — it did not do so for the right reason. Instead, it issued a ruling based upon a subjective judicial assessment of the reasonable expectation of privacy of the Respondent in this case, thereby creating yet another Fourth Amendment conflict among the circuits, such a conflict can only be definitively resolved by a return to the

original text and purpose of the Fourth Amendment, as demonstrated *infra*.

II. THE ORIGINAL OBJECTIVE, PROPERTY-BASED TEXT AND PURPOSE OF THE FOURTH AMENDMENT SHOULD BE REVIVED AND APPLIED.

In Heller, this Court found that "[t]he first salient feature of the operative clause [of the Second Amendment] is that it codifies a 'right of the people.'" *Id.*, 554 U.S. at 579. And as the Heller Court further observed, this "right of the people" is a term of art, referring to "all members of the **political community**." *Id.* 554 U.S. at 580 (emphasis added). As a right of the people in their **political capacity**, the Court concluded that the Second Amendment was calculated to preserve the right of self-defense so that the people would not be dependent solely upon the Government to protect their lives, their liberties and their property. Indeed, the right was secured so that the people would not be defenseless if their Government became tyrannical. *See id.*, 554 U.S. at 591-600.

Like the Second and First Amendments, the Fourth Amendment secures a "right of the people." *Id.*, 554 U.S. at 579. This right was specifically designed to secure the people from "unwarrantable intrusion[s] of executive agents of [the Government] into the houses and among the private papers of individuals, **in order to obtain evidence** of political offences either committed or designed." T. Cooley, A Treatise on Constitutional Limitations, p. 366 (5th ed., Little,

Brown: 1883) (emphasis added). The Amendment also was designed to stop the exercise of "prerogative at the expense of liberty," by means of "roving commission[s]" or "general warrants" threatening "the person and property of every man." *Id.*, at 366, n.1. Thus, the Fourth Amendment reads not only that "the people ... be secure in their persons, houses, papers and effects against unreasonable searches and seizures," but that "no warrants shall issue but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

A. Two Rights, Not One.

The plain text of the Fourth Amendment protects two distinct rights:

> (i) the right of the people to be secure in their persons, houses, papers, and effects, from **unreasonable** searches and seizures; and
>
> (ii) the right not to be subject to a **general search** or seizure, but only to one particularly describing the place, person, or thing to be searched and seized.

Such would not have been the case under the initial proposal submitted by James Madison of Virginia in the House of Representatives. That precursor of the Fourth Amendment protected only the second right, not the first. It read:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all

> unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized. [*See* Sources of Our Liberties, p. 423 (R. Perry & J. Cooper, eds., ABA Found.: 1978.]

But Madison's was a "one-barrelled [proposal] directed apparently only to the essentials of a valid warrant."[4] His proposed text was later amended so as to "contain *two* clauses"[5]:

> The right of the people to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures **shall not be violated, and no warrants shall issue** , but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. [Emphasis added.]

By separating the two clauses:

> The general right of security from unreasonable search and seizure was

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[4] N.B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, p. 103 (Johns Hopkins Press: 1937).

[5] *Id.*

> given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment. [*Id.*]

B. The Property Right Is Primary.

In the seminal case of Boyd v. United States, 116 U.S. 616 (1886), a statute authorized a court, on motion of the prosecuting attorney, to issue a subpoena requiring a defendant to produce books, invoices, and papers in a forfeiture proceeding against goods that had been allegedly imported without payment of the requisite duties. In opposition to this subpoena, Boyd interposed the Fourth Amendment. According to the Court, the threshold question was whether "a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws [is] an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution." *Id.* at 622. In response, the Court stated:

> The **search for and seizure of stolen or forfeited goods** or goods liable to duties and concealed to avoid payment thereof are **totally different things from a search for and seizure** of a

> man's private **books and papers for the purpose of obtaining information therein contained or of using them as evidence against** him. The **two things differ toto coelo**. In the **one case, the Government is entitled to the possession of the property; in the other it is not.** [*Id.* at 623 (emphasis added.]

The Boyd Court instructed that the Fourth Amendment's first freedom — from unreasonable searches and seizures — protected one's property from a Government search and seizure unless the Government demonstrated a **superior property right** to the thing to be seized, no matter how particularized the search and seizure, or how well supported by probable cause, even if authorized by a disinterested magistrate. *See id.* at 623-29. *See also* Hayden, 387 U.S. at 318-19 (Douglas, J., dissenting). In conclusion, the Boyd Court stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.... [T]hey apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his **indefeasible right of personal security, personal liberty, and private property**, where

> that right has never been forfeited by his conviction of some public offense. [*Id.* at 630 (emphasis added).]

C. The Warrant Requirement Is Secondary.

The Boyd decision spawned what later became known as the "mere evidence" rule, namely, that search warrants may be:

> resorted to **only** when a **primary right** to search and seizure may be found in the interest which the public or the complainant may have **in the property to be seized**, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. [Gouled v. United States, 255 U.S. 298, 309 (1921) (emphasis added).]

Thus, Gouled, in turn, brought the Boyd "doctrine" into its "full flowering ... where an opinion was written by Justice Clarke for a unanimous Court that included both Justice Holmes and Justice Brandeis"[6]:

> The prosecution was for defrauding the Government under procurement contracts. Documents were taken from the defendant's business under a search

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[6] Hayden, 387 U.S. at 319 (Douglas, J. dissenting).

> warrant and used at the trial as evidence against him. **Stolen or forged papers could be so seized....; so could lottery tickets; so could contraband; so could property in which the public had an interest....** **But** the papers or documents fell in none of those categories and the Court held that even though they had been taken under a warrant, they were inadmissible at trial as **not even a warrant, though otherwise proper and regular, could be used 'for the purpose of making search to secure evidence'** of a crime. [*Id.*, 387 U.S. at 319 (Douglas, J., dissenting) (emphasis added).]

III. THE CURRENT AD HOC, SUBJECTIVE, PRIVACY-BASED VIEW OF THE FOURTH AMENDMENT SHOULD BE REJECTED.

A. Privacy Interest Substituted for Property Rights.

Forty-six years after Gouled, however, this Court abandoned its well-established Fourth Amendment jurisprudence based upon "property rights" in favor of one rooted in an emerging right of "privacy." *See* Warden v. Hayden, 387 U.S. 294 (1967). Claiming dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts," Justice William J. Brennan — writing for a bare majority of five justices — jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable."

Id. at 295-97. Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits [of crime] and contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the Government to demonstrate that it has a "superior property interest"[7] in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from "irrational,"[8] "discredited,"[9] and "confus[ing]"[10] decisions of the past, and thereby would provide for a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property." *Id.* at 304.

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Earl Warren) stated that he could "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the warrant requirement,"[11] Justice Fortas sought to avoid what he

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[7] *Id.* at 303-04.

[8] *Id.* at 302.

[9] *Id.* at 306.

[10] *Id.* at 309.

[11] *Id.* at 312 (Fortas, J., concurring).

called "an **enormous and dangerous hole** in the Fourth Amendment"[12].

> [O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "**writs of assistance**," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in **gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* at 312 (Fortas, J., concurring) (emphasis added).]

B. The Fourth Amendment Property Principle Erased.

Had the Hayden Court not thrown out the "mere evidence" rule, there would be no doubt that no warrant could lawfully have been issued to "covertly install and monitor a global positioning system (GPS) tracking device on Respondent's Jeep Grand

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[12] *Id.* (Fortas, J., concurring) (emphasis added).

Cherokee."[13] According to the Government, the sole purpose of such an installation was to gather evidence of the movement of the vehicle. *Id.*, Pet., pp. 3-5. Indeed, by introducing the data obtained by means of such a device, the Government was, in effect, forcibly collecting information about Respondent's movements for the sole purpose of using such data as evidence against him. Although some of the movements of the Respondent's jeep over a month-long surveillance period may have been seen by third parties, including Government investigating agents, the very purpose of the GPS tracking system was to chronicle only that which the Respondent himself would know — all of the Jeep's movements over that same period. By extracting that information by the GPS device, the Government, in purpose, and in effect, was **compelling the defendant to testify against himself.**

In Boyd, the Court "noticed the intimate relation between" the Fourth Amendment and the prohibition against compelled self-incrimination in the Fifth:

> For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of **compelling a man to give evidence against himself.** [Boyd, 116 U.S. at 633 (emphasis added).]

Thus, the Boyd Court's "mere evidence" rule

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[13] *See* Pet., p. 3.

protected the right against self-incrimination because, under that rule, search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding." Gouled, 255 U.S. at 309.

In explaining the property principle undergirding the first freedom, as protected by the Fourth Amendment, the Boyd Court warned that, although the evidence seized in that case complied with the warrant requirement:

> **[I]llegitimate and unconstitutional practices** get their first footing ... by **silent approaches and slight deviations** from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to a gradual depreciation of the right.... It is the **duty of courts to be watchful** for the constitutional rights of the citizen, and **against any stealthy encroachments** thereon. Their motto should be **obsta principiis**. [*Id.*, 116 U.S. at 635 (emphasis added).]

Ignoring this Court's admonition, Justice Brennan frankly admitted that, by erasing the property protection from the Fourth Amendment, his newly-

minted privacy-based Hayden rule "**does enlarge the area of permissible searches.**" Hayden, 387 U.S. at 309 (emphasis added). He apparently assumed that the newly-permitted intrusions for "mere evidence" would be checked by the warrant, probable cause, and magistrate requirements of the Amendment's second phrase. *See id.* However, as the instant case dramatically illustrates, Justice Brennan's Fourth Amendment revolution has actually undermined the warrant, probable cause, and magistrate requirements of the Amendment.

C. The Warrant Requirement Undermined.

Having abandoned the "mere evidence" rule for the "reasonable expectation of privacy" guideline, the Hayden Court opened the door not only to a search warrant authorizing the installation of a GPS device, but to the implantation of such a device **without a search warrant** on the theory that there is **no expectation of privacy** as to a person's movements on a public highway.[14] *See* Pet., p. 10. Under this view, if there were no such privacy expectation, then the Fourth Amendment would cease to apply altogether, the Government having no need for probable cause or even reasonable suspicion to place a

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[14] If the Government has the right to place a GPS device on a citizen's automobile to gather movement data because no citizen has any reasonable expectation of privacy, why should not a citizen have a reciprocal right to place a GPS on a government official's car? Surely the government official has no different expectation of privacy. No doubt, however, if any citizen were to be so bold, the Government would be quick to indict him, *inter alia*, for trespassing on government property.

tracking device on any automobile.

Just as Justice Fortas forecast, Justice Brennan's privacy rationale has undermined the "Fourth Amendment's prohibition against general searches." *See* Warden v. Hayden, at 312 (Fortas, J., concurring). In its Petition, the Government has: (a) informed this Court that "federal law enforcement agencies frequently use tracking devices **early** in investigations before suspicions have ripened into probable cause;" (b) argued that applying the Fourth Amendment would "prevent[] law enforcement officials from using GPS devices in an effort to **gather information** to *establish* probable cause;" and (c) asserted that, as a consequence, "the government's ability to investigate **leads and tips,**" will be "seriously impede[d]." Pet., p. 24 (italics original, bold added). In short, the Government demands this Court sanction its unbridled discretion to search suspected driving activities, seizing data as to the movement of vehicles on the public highways, in order to gather enough information to establish probable cause to institute criminal proceedings. The GPS technology, then, serves the Government in the same way as the discredited general warrant — legitimizing intrusions upon property without first having to demonstrate before a judicial magistrate that it has "probable cause." Indeed, if there is no reasonable expectation of privacy, as the Government has argued, then the warrant requirement would not even come into play, much less would the Government be required to have "probable cause," or even "reasonable suspicion" to

install a GPS on one's automobile.[15]

As the Boyd Court recalled, the Fourth Amendment's prohibition against "unreasonable searches and seizures" was the direct product of the government practice "of issuing **writs of assistance** to the revenue officers, empowering them, in their discretion, to search such suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, **the most destructive of English liberty and fundamental principles of law**, that ever was found in an English law book." Boyd, 116 U.S. at 625 (emphasis added). In his classic Treatise on Constitutional Limitations, renowned constitutional scholar, Thomas Cooley, ranked the Fourth Amendment guarantee of "citizen immunity in his home against the prying eyes of the Government, and protection in person, property, and papers against even the process of law" **next in importance to the constitutional ban on personal slavery.** T. Cooley, A Treatise on Constitutional Limitations, p. 365 (5th ed., Little, Brown: 1883) (emphasis added).

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[15] The Government has attempted to reassure the Court that it need not be concerned about its use of GPS without reasonable suspicion in this case, since it was not in this particular case part of a "**'dragnet'** surveillance ... conducted without any articulable suspicion" — the constitutionality of which law enforcement technique will need to be resolved in some future decision. *See* Pet., p. 15 (emphasis added).

But if an **individual driver** has no reasonable expectation of privacy while driving his automobile on a public road, why would **many drivers** cumulatively have such a privacy expectation?

While one's personal automobile has not yet achieved the exalted status of the home, the Fourth Amendment pronounces that "persons," "houses," "papers," and "effects" are equally secured from unreasonable searches and seizures. Each is a right of the people, and best protected by enduring, unchanging common law rules of private property, not by modern evolving chameleons invented by judges.

IV. THE FOURTH AMENDMENT PROTECTS NOT ONLY AGAINST THE SEIZURE OF DATA BY GPS DEVICES, BUT THE VERY USE OF SUCH DEVICES.

According to the laws of nature, "every Man has a property in his own person." J. Locke, The Second Treatise on Civil Government, Chap. V, sec., 27 (1690). For the Government to claim a right to stalk any person suspected to be engaged in criminal activity is tantamount to a claim that a concerned father might make to keep track of a young daughter simply to make sure that she behaves. In the American constitutional republic, founded by "We, the people," the Government's relationship with its citizens was never intended to be upended by this kind of state paternalism.

The Government attempts to excuse its covert GPS surveillance of respondent's automobile because "the GPS data introduced at trial related only to the movements of the Jeep on public roads." Pet., p. 5. But once installed, the GPS gathered data while the vehicle was on private property. *Id.* Under the privacy rationale of the Fourth Amendment, all of the

judges below agreed that the evidence gathered while the vehicle was on private property should be suppressed. They differed in opinion only on the question whether the evidence gathered while the vehicle was on public roads should be admitted. Yet, the intrusion on respondent's person was the same. The Government was surreptitiously tracking respondent's vehicular movements as if the Government has an inherent right to gather "immense amount[s] of information about a person's private life" — whether it be by "use of pen registers, repeated trash pulls, aggregation of financial data, [or] prolonged visual surveillance" — limited only by whatever technology and funds were at the Government's disposal in its absolute autonomous discretion. *See* Pet., pp. 24-26.

Unlike other nations in which the governing officials are Lords and Benefactors,[16] under the United States Constitution, the federal Government is the servant of a sovereign people. The Fourth Amendment, as originally designed and purposed, was to ensure that the Government honored that relationship, preserving the right of private property as the enduring barrier against a totalitarian State. As Professor Cooley so memorably wrote:

> The maxim that 'every man's house is his castle,'[17] is made a part of our

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[16] *See* Luke 22:25.

[17] This "maxim" may now be inoperative in Indiana where, last week, the State Supreme Court rejected the common law rule,

> constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen. [Cooley's Treatise at p. 365 (footnote added).]

And, the Amendment's express language stretches beyond one's home, to one's person, papers, and effects — including one's automobile — each of which is protected by the common law of private property. The prevailing Fourth Amendment jurisprudence based upon the malleable "reasonable expectation of privacy" is unworthy of this great liberty.

V. THE FOURTH AMENDMENT PROTECTS THE PEOPLE FROM TYRANNY.

These *amici curiae* represent organizations primarily concerned with First and Second Amendment matters. They are therefore aware of the history of the primary role that government searches and seizures have served in the enforcement of laws aimed at political dissenters. Indeed, it would be a "misread[ing] [of] history [to] relat[e] the Fourth Amendment primarily for searches for evidence to be used in criminal prosecutions." *See* Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J.,

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dating back to the 1215 Magna Carta, that a home owner has a right to resist an unlawful police entry on the ground that such a right is "against public policy and incompatible with modern Fourth Amendment jurisprudence." *See* Barnes v. Indiana, Sup. Ct. No. 82S05-1007-CR-343, 2011 Ind. LEXIS 353, p. 3.

dissenting). Rather, the Fourth Amendment was designed to protect the political and religious nonconformist from the use of general warrants to suppress the freedoms of religion and the press. *See id.*, 359 U.S. at 376-77 (Douglass, J., dissenting). Indeed, the general warrant was a primary tool employed by the Star Chamber not only in the area of trade and commerce, but in political and religious matters as well. *See* J. Scarboro & J. White, Constitutional Criminal Procedure, pp. 23-24 (Foundation Press:1977).

Even after the Star Chamber was abolished in 1648, the English crown attempted to suppress political dissent, utilizing the general warrant to confiscate whole libraries of authors of "seditious papers." Such practices endured well into the 18th Century when Lord Camden issued his opinion in Entick v. Carrington, 19 How. St. Trials 1030 (1765), establishing both the property principle and the warrant requirement of the Fourth Amendment, as articulated and embraced in Boyd. *See id.*, 116 U.S. at 625-30.

While this case involves a matter of quite a different genre, the Fourth Amendment jurisprudence applied here impacts upon the increasingly intrusive administrative enforcement of regulations governing various aspects of modern life, including, for example, air travel. Indeed, in the administrative state that the United States increasingly resembles, the Fourth Amendment's warrant and probable cause standards have already been weakened in such cases as Camara v. Municipal Court, 387 U.S. 523 (1967) (authorizing

warrants to be issued without probable cause to inspect homes by city housing inspectors) and United States v. Biswell, 406 U.S. 311 (1972) (upholding a firearms statute authorizing warrantless searches of Federal Firearms Licensees). Such diminutions in liberty are inevitable if Fourth Amendment rights are protected by a test that turns on current societal privacy expectations, rather than on historic and enduring rights of private property. As Justice Douglas so wisely observed: "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *See* Frank, 359 U.S. at 380 (Douglas, J., dissenting).

While even rules based on the right to private property are no guarantee of the people's liberty, this was the approach chosen by the founders as the best way that the people can protect themselves from a Government that it feared could someday seize the same type of tyrannical powers claimed by King George. The founders probably could not have anticipated how far we have fallen, with bureaucrats enforcing unnumbered incomprehensible regulations, physically patting down men, women and children before being allowed the privilege to travel, and even prying into how the people eat, drink, speak, and maintain their physical health. As the Government extends its dominion over historically sacrosanct areas of individual discretion, one's "reasonable expectation of privacy" correspondingly shrinks. Although all constitutional provisions should be understood by their text, and authorial intent, the modern method of determining its meaning from what people presumably now think or expect, renders clear terminology

meaningless and the Constitution powerless.

With an emasculated Fourth Amendment, why would the Government refrain from generalized stealth surveillance? Undeterred by this Court's rulings in cases like United States v. Knotts, 460 U.S. 276 (1983), the Government operates under no Fourth Amendment disincentive from using virtually any sophisticated surveillance device, yet undisclosed or unimagined. Such technology may be deployed — without a warrant — against anyone as long as it gathers at least some evidence where there is no "privacy expectation." As a result, only a slight fraction of one's waking hours may be afforded protection from these all-seeing eyes of Government. The judicial abandonment of the mere evidence rule fosters this movement toward warrantless surveillance. Such government surveillance is enough to make the most devoted Orwellian swell with pride. Most assuredly, however, it would have fomented an insurrection by America's founders.

CONCLUSION

The Hayden opinion does not advance the cause of liberty. Rather, its privacy expectation approach to the Fourth Amendment has created an inverse relationship between the growth of Government and the protections of that Amendment. Bluntly put, if Hayden is left standing, it encourages tyranny, not freedom. Only by embracing the foundational principles of private property enshrined in the Fourth Amendment will the people's liberties be restored.

For the reasons stated, this Court should grant the Government's petition for a writ of certiorari, and invite the parties to submit briefs and argument addressing the question whether Warden v. Hayden should be overruled, and the textually-faithful rules of Boyd and Gouled be restored.

Respectfully submitted,

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JOINT APPENDIX

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: JUNE 27, 2011

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II

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3034

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTOINE JONES, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
05/07/08	NOTICE OF APPEAL filed [1115075] by Antoine Jones of decision of U.S. District Court. [08-3034]
	* * * * *
02/18/09	APPELLANTS BRIEF [1165850] filed by Lawrence Maynard in 08-3030, Antoine Jones in 08-3034 [Service Date: 02/18/2009] Copies: 15 (Final Brief); Pages: 21-30; Word Count for Brief: 19,126; Disclosure Statement: Not At-

DATE	PROCEEDINGS
	* * * * *
	Attached; Certificate of Parties: Attached [08-3030, 08-3034]
02/18/09	APPENDIX [1165857] filed [Volumes:3] [Number of Paper Copies: 10 (Appendix)] [Service Date:02/18/2009] [08-3030, 08-3034]
	* * * * *
03/03/09	AMICUS FOR APPELLANT BRIEF [1169561] filed by American Civil Liberties Union of the National Captial Area and Electronic Frontier Foundation [Service Date: 03/03/2009] Copies: 15 (Final Brief); Pages: 21-30; Word Count for Brief: 5,824; Disclosure Statement: Attached; Certificate of Parties: Attached [08-3034, 08-3030] [styled as BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA IN SUPPORT OF APPELLANT JONES]
	* * * * *
06/08/09	APPELLEE BRIEF [1184455] filed by USA in 08-3030, 08-3034 [Service Date: 06/08/2009] Length of Brief: 19,786. [08-3030, 08-3034]

DATE	PROCEEDINGS
06/08/09	APPENDIX [1184456] filed (Titled "Record Material") [Volumes:1] [Service Date: 06/08/2009] [08-3030, 08-3034]
	* * * * *
08/27/09	APPELLANT REPLY BRIEF [1204210] filed by Lawrence Maynard in 08-3030, Antoine Jones in 08-3034 [Service Date: 08/28/2009] Length of Brief: 6992. [08-3030, 08-3034] (Lister, Mary)
08/27/09	SUPPLEMENTAL APPENDIX [1204211] LODGED [Volumes: 1] [Service Date: 08/28/2009] [08-3030, 08-3034] (Lister, Mary)
	* * * * *
11/17/09	ORAL ARGUMENT HELD before Judge Ginsburg, Tatel and Griffith [08-3030, 08-3034]
01/14/10	LETTER FILED [1225568] by USA in 08-3030 pursuant to FRAP 28j advising of additional authorities [Service Date: 01/14/2010] [08-3030, 08-3034] (Smith, Peter)
04/21/10	LETTER FILED [1240876] by USA pursuant to FRAP 28j advising of additional authorities [Service Date: 04/21/2010] [08-3030] (Smith, Peter)

DATE	PROCEEDINGS
05/26/10	LETTER FILED [1246599] by USA pursuant to FRAP 28j advising of additional authorities [Service Date: 05/26/2010] [08-3030] (Smith, Peter)
08/06/10	PER CURIAM JUDGMENT filed [1259296] that the judgment of conviction and sentence of Maynard in No. 08-3030 be affirmed, and the judgment of conviction of Jones in No. 08-3034 be reversed for the reasons in the accompanying opinion. Before Judges: Ginsburg, Tatel and Griffith. [08- 3030, 08-3034]
08/06/10	OPINION filed [1259298] (Pages: 41) for the Court by Judge Ginsburg [08-3030, 08-3034]
08/06/10	CLERK'S ORDER filed [1259300] withholding issuance of the mandate. [08-3030, 08-3034]
09/20/10	PETITION filed [1266839] by Appellee USA for rehearing en banc. [Service Date: 09/20/2010 by CM/ECF NDA, US Mail] Pages: 11-15. [08-3034] (Smith, Peter)
09/23/10	CLERK'S ORDER filed [1267580], on the court's own motion, that within 15 days of the date of this order, appellant in case No. 08-3034 file a response to the petition for rehearing en banc, not to exceed 15 pages. Absent further order of the court,

DATE	PROCEEDINGS
	the court will not accept a reply to the response. [08- 3034, 08-3030]
10/6/10	RESPONSE FILED [1270273] by Antoine Jones in 08-3034 to petition for rehearing en banc [1266839-2] [Service Date: 10/06/2010 by CM/ECF NDA] Pages: 11-15. [08- 3034] (Leckar, Stephen)
	* * * * *
11/19/10	PER CURIAM ORDER, En Banc, filed [1278562] denying petition for rehearing en banc [1266839-2] in 08-3034. Before Judges: Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh. [08-3034, 08-3030] (Chief Judge Sentelle and Circuit Judges Brown and Kavanaugh would grant the petition for rehearing en banc) (A statement by Circuit Judges Ginsburg, Tatel, and Griffith concurring in the denial of rehearing en banc is attached) (A statement by Chief Judge Sentelle, joined by Circuit Judges Henderson, Brown, and Kavanaugh dissenting from the denial of rehearing en banc is attached) (A statement by Circuit Judge Kavanaugh dissenting from the denial of rehearing en banc is attached)

DATE	PROCEEDINGS
11/19/10	Publishing Order [1278562-2] [08-3034, 08-3030]
11/30/10	MOTION filed [1280438] by USA in 08-3034 to Stay Issuance of the Mandate. (Response to Motion served by mail due on 12/13/2010) [Service Date: 11/30/2010 by CM/ECF NDA] Pages: 1-10. [08-3034, 08-3030] (Smith, Peter)
	* * * * *
12/17/10	PER CURIAM ORDER filed [1283648] Upon consideration of appellee's motion to stay the mandate pending petition for writ of certiorari and the notice of filing concerning the motion, it is ORDERED that the motion be granted. The Clerk is directed to withhold issuance of the mandate through February 17, 2011. If, within the period of the stay, appellee notifies the Clerk in writing that a petition for writ of certiorari has been filed, the Clerk is directed to withhold issuance of the mandate pending the Supreme Court's final disposition. Before Judges: Ginsburg, Tatel and Griffith. [08-3034]
	* * * * *

DATE	PROCEEDINGS
03/18/11	MOTION filed [1298868] by USA in 08-3034 to stay mandate (Response to Motion served by mail due on 03/31/2011) [Service Date: 03/18/2011 by CM/ECF NDA, US Mail] Pages: 1-10. [08-3034, 08-3030] (Smith, Peter)
	* * * * *
04/07/11	PER CURIAM ORDER filed [1302243] ORDERED that the motion to extend the stay of the mandate be granted. The Clerk is directed to withhold the mandate through April 15, 2011. If, within the period of the stay, appellee notifies the Clerk in writing that a petition for writ of certiorari has been filed, the Clerk is directed to withhold issuance of the mandate pending the Supreme Court's final disposition. Before Judges: Ginsburg, Tatel and Griffith. [08-3034, 08-3030]
04/15/11	LETTER filed [1304354] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed 04/15/2011 and placed on the docket on 04/15/2011 as No. 10-1259. [08-3034]
	* * * * *

DATE	PROCEEDINGS
06/28/11	LETTER filed [1315729] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: The petition for writ of certiorari was Granted on 06/27/2011. [08-3034]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

No. 1:05-cr-00386-ESH-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANTOINE JONES, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/25/05	1	INDICTMENT as to ANTOINE JONES (1) count(s) 1, JOHN ADAMS (2) count(s) 1, DEMETRIS JOHNSON (3) count(s) 1, ADRIAN JACKSON (4) count(s) 1, MICHAEL HUGGINS (5) count(s) 1, KEVIN HOLLAND (6) count(s) 1, ALBERTO ROLANDO CARRILLO-MONTELONGO (7) count(s) 1, ROEL BREMEA, JR (8) count(s) 1, RICARDO SANCHEZ-GONZALEZ (9) count(s) 1. (erd) (Entered: 10/28/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
10/25/05	7	SUPERSEDING INDICTMENT as to ANTOINE JONES (1) count(s) 1s, JOHN ADAMS (2) count(s) 1s, DEMETRIS JOHNSON (3) count(s) 1s, ADRIAN JACKSON (4) count(s) 1s, MICHAEL HUGGINS (5) count(s) 1s, KEVIN HOLLAND (6) count(s) 1s, ALBERTO ROLANDO CARRILLO-MONTELONGO (7) count(s) 1s, ROEL BREMEA, JR (8) count(s) 1s, RICARDO SANCHEZ-GONZALEZ (9) count(s) 1s. (erd) (Entered: 11/03/2005)
		* * * * *
03/16/06	88	SUPERSEDING INDICTMENT as to ANTOINE JONES (1) count(s) 1ss, 2ss, 3ss, DEMETRIS JOHNSON (3) count(s) 1ss, ADRIAN JACKSON (4) count(s) 1ss, 4ss, MICHAEL HUGGINS (5) count(s) 1ss, KEVIN HOLLAND (6) count(s) 1ss, ALBERTO ROLANDO CARR-

DATE	DOCKET NUMBER	PROCEEDINGS
		ILLO-MONTELONGO (7) count(s) 1ss, ROEL BREMEA, JR (8) count(s) 1ss, RICARDO SANCHEZ-GONZALEZ (9) count(s) 1ss, LAWRENCE MAYNARD (10) count(s) 1, KIRK CARTER (11) count(s) 1. (cp,) (Entered: 03/17/2006)
		* * * * *
06/27/06	134	SUPERSEDING INDICTMENT as to ANTOINE JONES (1) count(s) 1sss, 2sss, 3sss; ADRIAN JACKSON (4) count(s) 1sss, 4sss; MICHAEL HUGGINS (5) count(s) 1sss; KEVIN HOLLAND (6) count(s) 1sss; KIRK CARTER (11) count(s) 1s. (FORFEITURE ALLEGATION) (cp,) Modified on 6/29/2006 (cp,). (Entered: 06/28/2006)
		* * * * *
07/12/06	144	MOTION for Order Omnibus Pre-Trial Motion by

DATE	DOCKET NUMBER	PROCEEDINGS
		ANTOINE JONES. (Attachments: # 1 Exhibit Exh. 1# 2 Exhibit Exh. 2# 3 Exhibit Exh. 3# 4 Exhibit Exh. 4# 5 Exhibit Exh. 5# 6 Exhibit Exh. 6# 7 Exhibit Exh. 7# 8 Exhibit Exh. 8# 9 Text of Proposed Order) (Balarezo, A.) (Entered: 07/12/2006)
		* * * * *
07/12/06	159	MOTION to Suppress evidence obtained from mobile tracking device by ANTOINE JONES (For scanned image, see doc. 144). (cp,) (Entered: 07/25/2006)
		* * * * *
07/23/06	150	MOTION to Suppress *Evidence Obtained from Electronic Tracking Device* by ANTOINE JONES. (Attachments: # 1 Exhibit Order # 2 Exhibit Tracker Page 1# 3 Exhibit Tracker Application and Affidavi t# 4 Text of Proposed Order)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Balarezo, A.) (Entered: 07/23/2006)
		* * * * *
07/24/06	151	Memorandum in Opposition by USA as to ANTOINE JONES, JOHN ADAMS, DEMETRIS JOHNSON, ADRIAN JACKSON, MICHAEL HUGGINS, KEVIN HOLLAND, ALBERTO ROLANDO CARRILLO-MONTE-LONGO, ROEL BREMEA, JR, RICARDO SANCHEZ GONZALEZ, LAWRENCE MAYNARD, KIRK CARTER re 142 MOTION to Suppress *Evidence Obtained from Interception of Wire Communications and Seizure of Electronic Communications and Incorporated Memorandum of Points and Authorities in Support Thereof*, 146 MOTION to adopt pleadings of co-defendants, 144 MOT-

DATE	DOCKET NUMBER	PROCEEDINGS
		ION for Order Omnibus Pre-Trial Motion, 150 MOTION to Suppress *Evidence Obtained from Electronic Tracking Device* (Lieber, Rachel) (Entered: 07/24/2006)
		* * * * *
08/10/06	171	ORDER denying 142 Motion to Suppress as to ANTOINE JONES (1); denying 144 Motion for Order as to ANTOINE JONES (1); denying in part 150 Motion to Suppress as to ANTOINE JONES (1); denying 154 Motion as to ANTOINE JONES (1); denying 156 Motion for Order as to ANTOINE JONES (1); denying 157 Motion for Discovery as to ANTOINE JONES (1); denying 158 Motion to Suppress as to ANTOINE JONES (1); denying in part 159 Motion to Suppress as to ANTOINE JONES (1); denying 160 Motion to Suppress as

DATE	DOCKET NUMBER	PROCEEDINGS
		to ANTOINE JONES (1) Signed by Judge Ellen S. Huvelle on 8/10/06. (MC) (Entered: 08/10/2006)
08/10/06	172	MEMORANDUM OPINION. Signed by Judge Ellen S. Huvelle on 8/10/06. (MC) (Entered: 08/10/2006)
		* * * * *
01/09/07		JURY VERDICT as to ANTOINE JONES (1) Not Guilty on Count 6sss- 7sss, 9sss, 11sss-13sss, 16sss-17sss, 19sss, 22sss-23sss, 26sss, 28sss, 31sss-32sss, 33sss-34sss. (hsj,) (Entered: 01/12/2007)
		* * * * *
01/09/07	307	VERDICT FORM as to ANTOINE JONES. (hsj,) (Entered: 01/12/2007)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
01/12/07		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Jury deliberations concluded as to ANTOINE JONES held on 1/12/2007 ANTOINE JONES (1) Count 1sss, 5sss, 8sss, 10sss, 14sss-15sss, 18sss, 20sss-21sss, 24sss-25sss, 24sss, 25sss, 27sss, 29sss, 30sss. Same 12 jurors. JURY RENDERED PARTIAL VERDICT AS TO ANTOINE JONES, NOT GUILTY on counts 24sss, 29sss. Jury panel hung on Count 1sss, 5sss, 8sss, 10sss, 14sss-15sss, 18sss, 20sss-21sss, 25sss, 27sss, 30sss. Mistrial declared by the Court. Jury panel discharged. (Bond Status of Defendant: Defendant Committed/Commitment Issued (Court Reporter Lisa Griffith—No Court Time) (Defense Attorney: Eduardo

DATE	DOCKET NUMBER	PROCEEDINGS
		Balarezo; US At torney: Rachel Lieber and John Geise) (hsj,) (Entered: 01/18/2007)
		* * * * *
01/12/07	309	VERDICT FORM as to ANTOINE JONES. (hsj,) Modified on 1/19/2007 (hsj,). (Entered: 01/18/2007)
		* * * *
03/21/07	344	SUPERSEDING INDICTMENT as to ANTOINE JONES (1) count(s) 1ssssss, LAWRENCE MAYNARD (10) count(s) 1s, KIRK CARTER (11) count(s) 1sss, FRANCISCO JAVIER GONZALEZ-RUAN (12) count(s) 1, GUADALUPE BARRONE (13) count(s) 1, JOSE GARCIA (14) count(s) 1, CARLOS REYNA (15) count(s) 1. (cp,) (Entered: 03/22/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
01/10/08		JURY VERDICT as to ANTOINE JONES (1) Guilty on Count 1ssssss. (hsj,) Modified on 1/18/2008 (hsj,). (Entered: 01/15/2008)
01/10/08	444	VERDICT FORM as to ANTOINE JONES. (hsj,) (Entered: 01/15/2008)
		* * * * *
05/02/08		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Sentencing held on 5/2/2008 as to ANTOINE JONES (1). Counts 1, 10sss, 11sss-13ss, 14sss-15sss, 16sss-17sss, 18sss, 19sss, 1s, 1ss, 1sss, 20sss-21sss, 22sss-23sss, 24sss, 25sss, 26sss, 27sss, 28sss, 29sss, 2ss, 2sss, 30sss, 31sss-32sss, 33sss-34sss, 3ss,3sss, 5sss, 6sss-7sss, 8sss and 9sss: Dismissed on Oral Motion of the Government. Count 1ssssss: Defendant sentenced

DATE	DOCKET NUMBER	PROCEEDINGS
		to LIFE IN PRISON to run concurrent with sentence imposed in CR 94-193 and Ten (10) Years of Supervised Release; Special Assessment of $100.00 and Restitution of $2,000.00 imposed with the interest waived. Bond Status of Defendant: Defendant committed; commitment issued. (Court Reporter: Lisa Griffith; Defense Attorney: Eduardo Balarezo; US Attorneys: Rachel Carlson Leiber and John Geise; Prob Officer: Kelli Kave) (tnr,) (Entered: 05/02/2008)
05/02/08	504	FINAL ORDER OF FORFEITURE as to ANTOINE JONES signed by Judge Ellen S. Huvelle on 5/2/08. (tnr,) (Entered: 05/02/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
05/02/08	506	NOTICE OF APPEAL - Final Judgment by ANTOINE JONES re Sentencing held on 5/2/08 and 504 Order for Forfeiture of Property dated 5/2/08. Fee Status: No Fee Paid-CJA. Parties have been notified. (tnr,) (Entered: 05/05/2008)
		* * * * *
05/05/08	509	JUDGMENT as to ANTOINE JONES. Statement of Reasons Not Included. Signed by Judge Ellen S. Huvelle on 5/2/08. (tnr,) (Entered: 05/06/2008)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISC. NO. [05-0346]

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF AN ELECTRONIC TRACKING DEVICE IN A GOLD JEEP GRAND CHEROKEE AUTOMOBILE, MARYLAND REGISTRATION NUMBER M667480, VEHICLE IDENTIFICATION NUMBER 1J4GW48S71C683464

[Filed: Sept. 16, 2005]

UNDER SEAL

EX PARTE APPLICATION FOR ORDER AUTHORIZING USE OF AN ELECTRONIC TRACKING DEVICE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, pursuant to the All Writs Act (28 U.S.C. § 1651(a)),[1] 18 U.S.C. § 3117 (Mobile Tracking Devices),

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[1] 28 U.S.C. § 1651(a) provides that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

and Federal Rule of Criminal Procedure 41, hereby moves for an Order authorizing the use of an Electronic Tracking Device in a Jeep Grand Cherokee, Gold in color, bearing Maryland registration number M667480 and Vehicle Identification Number 1J4GW48S71C683464 (the "subject vehicle"), for a period of ninety days in an investigation of offenses being committed by Antoine Jones and other, using the above-listed subject vehicle, in violation of 21 U.S.C. §§ 841 and 846 and 18 U.S.C. §§ 1956 and 1957.

We further request that the Order authorize the temporary appropriation and surreptitious entry into the subject vehicle at any hour of the day or night in order to install the electronic tracking device, remove the electronic tracking device, or to make necessary mechanical adjustments should the device need mechanical adjustments or become inoperable.

We further request that the Order authorize the monitoring agents, in the event that the subject vehicle travels outside the territorial jurisdiction of the Court, to continue to use the electronic tracking device in any jurisdiction.

We further request that the Order authorize Special Agents of the Federal Bureau of Investigation, and other law enforcement officers, are not required to leave copies of the Court's Order in any premises or vehicle entered due to the covert nature of this installation and investigation.

We further request that this Application, accompanying Affidavit, and the Court's Order be placed under seal until further order of the Court.

POINTS AND AUTHORITIES

Use of A Mobile Tracking Device.

In *United States v. Knotts*, 460 U.S. 276, 281-82 (1983), the Supreme Court held that warrantless monitoring of an electronic tracking device does not violate the Fourth Amendment if it reveals no information that could not have also been obtained through visual surveillance. Monitoring of a device in a private residence to obtain "a critical fact about the interior of the premises"—information that could not have been observed through physical observation—however, requires proper judicial authorization. *United States v. Karo*, 468 U.S. 705, 715-16 (1984); *see also United States v. Jones*, 31 F.3d 1304, 1310-11 (4th Cir. 1994). In order to obtain judicial approval, it is sufficient if the applicant "describes the object into which the beeper is to be placed, the circumstances that led the agents to wish to install the beeper, and the length of time for which the surveillance is requested." *Karo*, 468 U.S. at 718.

Installation of A Mobile Tracking Device.

Additional Fourth Amendment interests are implicated if the installation of the tracking device requires government intrusion into an area in which an individual has a reasonable expectation of privacy. *Jones*, 31 F.3d at 1309-11. Search warrant authority, as enumerated in Federal Rule of Procedure 41(b)(2), extends to installing tracking devices on moveable property. *See United States v. Gbemisola*, 225 F.3d 735, 737 n.2 (D.C. Cir. 2000). And courts may authorize surreptitious entries by agents for the purpose of installing electronic tracking devices. *See United States v. Hufford*, 539 F.2d 32, 34 (9th Cir. 1979).

Pursuant to Federal Rule of Criminal Procedure 41(e)(2) we are also requesting authority to install the device at any time of the day or night. Due to the surreptitious nature of this investigation, the agents may not be able to install the device during the daytime.

The affidavit of Special Agent Stephanie Yanta of the Federal Bureau of Investigation demonstrates probable cause to believe that the subject vehicle is being used by Antoine Jones to commit further violations of 21 U.S.C. §§ 841 and 846 and 18 U.S.C. 1956 and 1957, within and outside the District of Columbia. Consequently, in light of the above authorities, and Fed. R. Crim. P. 41(b)(2), the Court may authorize agents to temporarily appropriate the subject vehicle so that they can surreptitiously enter the subject vehicle to install the device, maintain the device, and remove the device at the conclusion of the investigation. Additionally, 18 U.S.C. § 3117 enables the Court to authorize monitoring of the tracking device both within and outside the District of Columbia.

Postponement of the Notice Requirement under Fed. R. Crim. P. 41(d).

Federal Rule of Criminal Procedure 41(c) states that the agent taking property under a warrant must provide a copy of the warrant to the person in charge of the premises or leave a copy at the place from which the property was taken. However, under 18 U.S.C. § 3103(a) such notice may be delayed. *See also United Stated v. Villegas*, 899 F.2d 1324, 1336 (2d Cir. 1990) (holding prior to adoption of § 3103 that "covert entries without

contemporaneous notice may be authorized.") There are two reasons why delayed notice is reasonable here: First, the search warrant is not fully executed at installation, and will not be executed until the device is removed and the authorization period has expired. Second, leaving a copy of the warrant at the place searched (*i.e.*, the subject vehicle) would alert Jones to the presence of the device, completely defeating the purpose of the installation and seriously jeopardizing the ongoing investigation.

Filing Under Seal.

We ask that this Application, accompanying Affidavit, and the Court's Order be placed under seal. Inasmuch as this request is part of an ongoing covert investigation, disclosure would not only render this request for authority to place tracking devices moot, it would also endanger the other ongoing aspects of this investigation. Accordingly, these facts present an extraordinary situation and a compelling governmental interest which justify sealing of this Application, the accompanying Affidavit and Order.

WHEREFORE, we request that this Court authorize the placement and monitoring of an electronic tracking device in the subject vehicle.

Respectfully submitted,

KENNETH L. WAINSTEIN
UNITED STATES ATTORNEY

/s/ JOHN V. GEISE 9/16/05
By: /s/ JOHN V. GEISE 9/16/05

JOHN V. GEISE
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISC. NO. [05-0346]

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF AN ELECTRONIC TRACKING DEVICE IN A 2001 GOLD JEEP GRAND CHEROKEE VEHICLE IDENTIFICATION NUMBER 1J4GW48S71C683464, MARYLAND TAG M667480

[Filed: Sept. 16, 2005]

UNDER SEAL

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER AUTHORIZING USE OF ELECTRONIC TRACKING DEVICE

I, Stephanie E. Yanta, Special Agent with the Federal Bureau of Investigation (FBI), Washington Field Office, Washington, D.C., (hereinafter affiant) being duly sworn, depose and state as follows.

1. I am "an investigative or law enforcement officer" of the United States within the meaning of Title 18, United States Code, Section 2510(7), that is, an officer of the United States, who is empowered by law to conduct investigations of and to make arrests for offenses

enumerated in Section 2516 of Title 18, United States Code.

2. I have been a Special Agent with the FBI since March 1998. I am currently assigned to the Safe Streets Task Force, which is tasked with the investigation of violent narcotics traffickers in the District of Columbia and elsewhere. I have previously participated in investigations that led to the arrest and conviction of narcotics dealers. Since 1998, I received training and experience in interviewing and interrogation techniques, arrest procedures, search and seizure, narcotics, white collar crimes, search warrant applications, and various other crimes. In the course of my training and experience, I have become familiar with the methods and techniques associated with the distribution of narcotics, the laundering of drug proceeds, and the organization of drug conspiracies. In the course of conducting these investigations, your affiant has been involved in the use of the following investigative techniques: interviewing informants and cooperating witnesses; conducting physical surveillance; conducting short-term and long-term undercover operations, including reverse undercover drug operations; consensual monitoring and recording of both telephonic and non-telephonic communications; analyzing telephone pen register and caller identification system data; conducting court-authorized electronic surveillance; and preparing and executing search warrants which have led to substantial seizures of narcotics, firearms and other contraband.

3. During the past several months I have been involved in the investigation of Antoine JONES. Antoine JONES, a/k/a/ Antonio JONES, a/k/a "TOINE" is a black male, born on February 25, 1960. He is described

as 6'2" tall and approximately 220 pounds, with a Social Security Number of [**REDACTED**]. JONES resides at 10870 Moore Street, Waldorf, Maryland, with a second address of 12221 Brandywine Road, Maryland. Based upon an investigation by the FBI and Metropolitan Police Department, Washington, D.C., the collecting information from confidential sources as well as the use of other investigative techniques, you affiant believes that JONES is engaging in trafficking substantial quantities of cocaine throughout the greater in the District of Columbia Metropolitan area.

4. Since September 2, 2005, JONES has been the subject of a Title III wire interception, authorized by this Court on that date. Your affiant has read the First Periodic Report Regarding Wire Intereceptions, approved by this Court on September 13, 2005, which summarizes some of the telephone activity, and finds it to be true and accurate, and here adopts it as part of this affidavit herein. Your affiant further adopts as part of this affidavit you affiant's affidavit in support of the wire interceptions, dated September 2, 2005.

WHEREFORE it is respectfully requested that the Court authorize the placing and monitoring of electronic surveillance equipment on the 2001 Gold Jeep Cherokee bearing Maryland tag M667480 and allow the agents entry upon private property to install, service and remove the device from the above described automobile.

/s/ STEPHANIE E. YANTA
STEPHANIE E. YANTA
Special Agent
Federal Bureau of Investigation

SWORN TO AND SUBSCRIBED before me this *16th* day of September, 2005.

/s/ PAUL L. FRIEDMAN
THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISC. NO. [05-0346]

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF AN ELECTRONIC TRACKING DEVICE IN A GOLD JEEP GRAND CHEROKEE AUTOMOBILE, MARYLAND REGISTRATION NUMBER M667480, VEHICLE IDENTIFICATION NUMBER 1J4GW48S71C683464

[Filed: Sept. 16, 2005]

UNDER SEAL

ORDER AUTHORIZING THE INSTALLATION AND USE OF AN ELECTRONIC TRACKING DEVICE

Upon the Application of the United States of America, and the Affidavit of Special Agent Stephanie Yanta of the Federal Bureau of Investigation, and full consideration having been given to the matter, the Court finds as follows:

a. there is probable cause to believe that Antoine Jones and others have committed and are committing violations of 21 U.S.C. §§ 841 and 846, and 18 U.S.C. §§ 1956 and 1957.

b. there is probable cause to believe that the vehicle described in the Affidavit of Special Agent Yanta, described as a Jeep Grand Cherokee, Gold in color, bearing Maryland registration number M667480 and Vehicle Identification Number 1J4GW48S71C683464 (the "subject vehicle") is being used by Jones to facilitate the distribution of controlled substances and related money laundering, in violation of 21 U.S.C. §§ 841 and 846, and 18 U.S.C. §§ 1956 and 1957.

c. there is reasonable cause to believe that providing immediate notification of the execution of the warrant may seriously jeopardize an ongoing investigation pursuant to 18 U.S.C. §§ 3103(a) and 2705(a)(B)(2).

WHEREFORE, pursuant to Federal Rule of Criminal Procedure 41, and 18 U.S.C. §§ 3117 and 3103(a), it is hereby

ORDERED that Special Agents of the Federal Bureau of Investigation, and other authorized officers, are hereby authorized to do the following:

a. Install and operate an electronic tracking device on the subject vehicle during any part of the day or night. The electronic tracking device may be operated and monitored continuously throughout the period of this Order and may be monitored when the subject vehicle is located in a place where there is a reasonable expectation of privacy.

b. Remove the electronic tracking device upon attainment of the objective of the investigation or upon the expiration of this Order, including any extensions, whichever occurs first.

c. The agents and other authorized law enforcement officers are authorized to temporarily appropriate and surreptitiously enter the subject vehicle for the explicit purposes of installing and removing the electronic tracking device, and to temporarily appropriate and surreptitiously reenter the subject vehicle at any time to make mechanical adjustments which may be necessary.

IT IS FURTHER ORDERED that this Order may be executed at any hour of the day or night and must be executed no later than ten days from the date of the issuance of this Order.

IT IS FURTHER ORDERED that monitoring agents, in the event that the subject vehicle travels outside the territorial jurisdiction of the Court, are allowed to continue to use the electronic tracking device in any jurisdiction.

IT IS FURTHER ORDERED that this authorization to operate the electronic tracking device as a physical surveillance aid must terminate when the objective of the investigation is reached or, in any event, at the end of ninety days from the date of this Order whichever is earlier.

IT IS FURTHER ORDERED that the Special Agents of the Federal Bureau of Investigation, and other authorized officers, are not required to leave a copy of this Order in any premises or vehicle entered due to the covert nature of this installation and investigation.

IT IS FURTHER ORDERED that notification of the surreptitious entry is delayed for a period of 90 days or until the objectives of the investigation are reached, whichever occurs first.

IT IS FURTHER ORDERED that the Application, Affidavit in support thereof, and this Order shall be placed under seal until further order of this Court.

/s/ PAUL L. FRIEDMAN
THE HONORABLE PAUL L. FRIEDMAN
United States District Judge for the
District of Columbia

DATED: Sept. 16, 2005
Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL NO. 05-386 (ESH)

UNITED STATES OF AMERICA

v.

ANTOINE JONES, LAWRENCE MAYNARD, KIRK CARTER, FRANCISCO JAVIER GONZALEZ-RUAN, GUADALUPE BARRONE, JOSE GARCIA, AND CARLOS REYNA, DEFENDANTS

VIOLATIONS: 21 U.S.C. § 846 (Conspiracy to Distribute and Possess with Intent to Distribute Five Kilograms or More of Cocaine and Fifty Grams or More of Cocaine Base)

21 U.S.C. § 853 (Criminal Forfeiture)

18 U.S.C. § 2 (Aiding and Abetting)

INDICTMENT

The Grand Jury charges that:

COUNT ONE

NARCOTICS CONSPIRACY

A. **THE CONSPIRACY**

From at least sometime in 2003, the exact date being unknown to the Grand Jury, up to and including Oc-

tober 24, 2005, in the District of Columbia, the State of Maryland, the State of Texas, the State of North Carolina, and elsewhere, the defendants, **ANTOINE JONES (hereinafter "Jones"), LAWRENCE MAYNARD (hereinafter "Maynard"), KIRK CARTER (hereinafter "Carter"), FRANCISCO-JAVIER GONZALEZ-RUAN (hereinafter "Gonzalez-Ruan"), GUADALUPE BARRONE (hereinafter "Barrone"), JOSE GARCIA (hereinafter "Garcia"), and CARLOS REYNA (hereinafter "Reyna"), did knowingly and willfully combine, conspire, confederate and agree together and with Roel Bermea (hereinafter "Bermea"), Alberto Rolando Carillo-Montelongo (hereinafter "Carillo-Montelongo), Ricardo Sanchez-Gonzalez (hereinafter "Sanchez-Gonzalez"), John Adams (hereinafter "Adams"), Demetris Johnson (hereinafter "Johnson"), Donald Hunter (hereinafter "Hunter"), and other persons both known to the grand jury (hereinafter individually referred to by the terms "unindicted co-conspirator-1," "unindicted co-conspirator-2," "unindicted co-conspirator-3," and "unindicted co-conspirator-4"), and unknown to the grand jury, to unlawfully, knowingly and intentionally distribute and possess with intent to distribute:**

a) a mixture and substance containing a detectable amount of cocaine, a schedule II narcotic drug controlled substance, and the amount of said mixture and substance was 5 kilograms or more, in violation of Title 21 United States Code, Sections 841(a)(1) and 841(b)(1)(A)(ii);

b) a mixture and substance containing a detectable amount of cocaine base, in the form of "crack," a schedule II narcotic drug controlled substance, and the amount of said substance was 50 grams or more, in viola-

tion of Title 21, United State Code, sections 841(a)(1) and 841(b)(1)(A)(iii).

B. GOALS OF THE CONSPIRACY

It was the principal goal of the conspiracy that, in order to obtain as much money and other things of value as possible, the defendants, and co-conspirators not indicted herein, both known and unknown to the grand jury, acquired, repackaged, stored, processed, sold, and redistributed quantities of cocaine and cocaine base, in the form of crack, in the District of Columbia, the State of Maryland, the State of Texas, the Republic of Mexico, and elsewhere.

C. MANNER AND MEANS TO EFFECTUATE THE CONSPIRACY

1. The members of the conspiracy played various and interchangeable roles based upon the needs of the conspiracy. **JONES** was the primary supplier of cocaine to members of the organization in the District of Columbia and the State of Maryland, including **CARTER**, Adams, Johnson, Hunter, and others known and unknown to the grand jury. **MAYNARD** assisted **JONES** in his cocaine sales to these co-conspirators. **JONES** was supplied with cocaine by various individuals, to whom he referred as "the Mexicans," including **GONZALEZ-RUAN, BARRONE, GARCIA, REYNA**, Bermea, Carillo-Montelongo, Sanchez-Gonzalez, and others unknown to the grand jury.

JONES's Mexican Suppliers

2. On some occasions, **JONES**, and/or **MAYNARD**, traveled out of the area to pick up cocaine, and to deliver

cash payment for the cocaine. On other occasions, individuals traveled to the Washington, D.C., area, to deliver large quantities of cocaine to stash locations where it was given to **JONES**, and to collect money from **JONES** and/or **MAYNARD**. **GONZALEZ-RUAN, BARRONE, GARCIA**, and others unknown to the grand jury, located in the State of Texas, and the Republic of Mexico, employed other individuals to transport large shipments of cocaine—at times in excess of 200 kilograms—in large trucks from Mexico, through Texas, to the Washington, D.C. area. Once the cocaine arrived in the D.C. areas, other individuals, such as **REYNA**, Bermea, Carillo-Montelongo, Sanchez-Gonzalez and others, unloaded it into smaller vehicles and transported it to stash locations for storage and distribution.

3. In furtherance of this business relationship with their Mexican distributors, **JONES** and **MAYNARD** rented houses, apartments, storage units, and other locations in the Washington, D.C., area, where **GONZALEZ-RUAN, BARRONE, GARCIA, REYNA**, Bermea, Carillo-Montelongo, Sanchez-Gonzalez, and others stored their cocaine for as much as a month at a time. The cocaine distributors also stored in these stash locations large amounts of cash that **JONES** delivered to them in payment for cocaine, which they ultimately transported to Mexico. Over time, as **JONES** grew tired of renting stash houses for the suppliers, the suppliers themselves rented houses in the Washington, D.C., area, for the same purpose.

4. From time to time, **GONZALEZ-RUAN, BARRONE, GARCIA, REYNA**, Bermea, Montelongo, Sanchez-Gonzalez, and others visited these stash locations to deliver cocaine and to collect, count, and pack-

age the money received from **JONES** in exchange for cocaine. These individuals then transported the money back to Mexico, via the state of Texas, sometimes in cars and SUVs, and at other times in large trucks similar to those that transported the cocaine up from Mexico, driven by other individuals known and unknown to the grand jury. These stash locations also served as temporary residences for **GONZALEZ-RUAN, REYNA**, Bermea, Montelongo, Sanchez-Gonzalez, and others.

5. Beginning in April, 2005, **REYNA**, Bermea, Carillo-Montelongo, and Sanchez-Gonzalez used a house located at 9508 Potomac Drive, Ft. Washington, Maryland (hereinafter "the Potomac Drive house"), as a location in which they stored cocaine for distribution, including at one time as much as 97 kilograms of powder cocaine. They also used this residence for storage of cash payments, including as much as $800,000, which they received in exchange for the cocaine. They also stored cash-packaging equipment in this residence, including plastic shrink-wrapping materials, a heat-sealing machine, and a money-counting machine. From time to time during this period they also resided in the house.

6. During the course of the conspiracy, **JONES** used a cellular telephone to set up meetings with **REYNA** and Bermea at the Potomac Drive house to drop off cash and collect multiple-kilogram quantities of cocaine from **REYNA**, Bermea, Carillo-Montelongo, and Sanchez-Gonzalez. During this time, **JONES** also spoke with **GARCIA** to discuss the timing of large shipments of cocaine from Mexico, through Texas, and into the Washington, D.C. area.

JONES's D.C.-Area Customers

7. From some time in at least 2003, as frequently as several times a week, **JONES** collected money from some of his local co-conspirators, including **CARTER**, Adams, Johnson, Hunter, unindicted co-conspirator-1, unindicted co-conspirator-2, unindicted co-conspirator-3, unindicted co-conspirator-4, and others known and unknown to the grand jury. **JONES** then visited a stash house, such as the Potomac Drive house, and met with **REYNA**, Bermea and others known and unknown to the grand jury, to deliver quantities of cash, and pick up multiple-kilogram quantities of cocaine for distribution to these co-conspirators. A short time later, **JONES** and/or **MAYNARD** supplied these co-conspirators with wholesale quantities of cocaine obtained from **REYNA**, Bermea, and others.

8. In terms of payment, JONES often "fronted," i.e., supplied on consignment, large quantities of cocaine to some of these co-conspirators. At other times, the co-conspirators paid **JONES** cash for the cocaine in advance, which **JONES** in turn delivered to the suppliers at the stash house in exchange for cocaine. Then **JONES** delivered this cocaine to the co-conspirators later in the day. At still other times, the co-conspirators paid **JONES** for the cocaine at the time he delivered it to them. The price **JONES** charged per kilogram varied between $20,000, and $23,000.

9. To set up these meetings, **JONES** communicated with his co-conspirators on his cellular telephone, often several times a day, to arrange meeting times and places. The physical transfer of cocaine and cash between **JONES** and **CARTER**, Adams, Johnson, Hunter, unindicted co-conspirator-1, unindicted co-conspirator-2,

unindicted co-conspirator-3, unindicted co-conspirator-4, and others known and unknown to the grand jury took place at Levels, a night club in the District of Columbia owned and operated by **JONES** and managed by **MAYNARD**; at Sam's Carwash and other commercial establishments along Branch Avenue in Temple Hills, Maryland; at the Prince George's County Sports and Learning Center near FedEx Field in Landover, Maryland; occasionally at their residences in the Washington, D.C. metropolitan area; and at other locations in the D.C. metro area known and unknown to the grand jury. **JONES** and his co-conspirators used plastic shopping bags, duffel bags, backpacks, and other bags to conceal the cocaine and money they were exchanging. **MAYNARD** occasionally accompanied **JONES** when he met with various co-conspirators to make deliveries of cocaine and to collect large cash payments. On other occasions, **MAYNARD** alone made deliveries of cocaine from **JONES** to the co-conspirators, and collected cash payments on behalf of **JONES**.

10. In addition to **MAYNARD**, **JONES** also employed other individuals, both known and unknown to the grand jury, to assist in the day-to-day operations of his cocaine-trafficking business. For example, Adams broke down larger amounts of cocaine into smaller packages for **JONES**, or Adams, to deliver to other co-conspirators, including **CARTER**, and **MAYNARD**. Adams also collected drug payments for **JONES** from time to time, and also stored cocaine for **JONES** at his residence.

11. When communicating with some of these co-conspirators over the phone, to avoid detection by law enforcement, JONES used "code" to avoid reference to

drugs, money, or meeting places for the transfer of drugs or payment for the drugs.

12. These co-conspirators frequently stored the cocaine they obtained from **JONES** at their residences, and then repackaged the cocaine into smaller quantities, and distributed it either as cocaine hydrochloride or cocaine base, in the form of crack. At times, some of the co-conspirators redistributed the cocaine in kilogram form. The total quantity of cocaine **JONES** provided to these co-conspirators during this timeframe was in excess of 500 kilograms.

13. From at least 2003, the exact date being unknown to the grand jury, up to and including October 24, 2005, **JONES** used his vehicle, a 2001 champagne-colored Jeep Grand Cherokee, MD license # M667480, to store cocaine and cash, which he had secreted in a variety of bags, including plastic shopping bags, duffel bags, and backpacks. **JONES** also used his Grand Cherokee to transport this cash to his suppliers, **GONZALEZ-RUAN**, **REYNA**, Bermea and others, and to transport cocaine from **REYNA**, Bermea and others and deliver it to **CARTER**, Adams, Johnson, Hunter, unindicted co-conspirator-1, unindicted co-conspirator-2, unindicted co-conspirator-3, unindicted co-conspirator-4, and other co-conspirators known and unknown to the grand jury.

D. OVERT ACTS

In furtherance of the conspiracy, and in order to effectuate the objects thereof, the defendants, and co-conspirators not indicted herein, whose identities are known and unknown to the grand jury, in various combinations, directly and indirectly, within the District of Columbia, the state of Maryland, the State of Texas, and

elsewhere, committed overt acts including, but not limited to, the following:

Overt Acts with Suppliers

1. On November 11, 2003, **JONES** rented 9719 Summit Circle, Apartment 3B, Largo, Maryland for use by **JONES, MAYNARD, GONZALEZ-RUAN, BARRONE**, and others both known and unknown to the grand jury, as a stash location for substantial quantities of cocaine and money.

2. On November 11, 2003, **JONES** provided falsified employment documents in connection with his rental of the apartment located at 9719 Summit Circle, Apartment 3B, Largo, Maryland.

3. In or about February, 2004, **GONZALEZ-RUAN** and others both known and unknown to the grand jury, used 9719 Summit Circle, Apartment 3B, Largo, Maryland, as a temporary residence, as they collected cash payments for cocaine they and others had supplied to **JONES** and **MAYNARD**.

4. On February 7, 2004, **GONZALEZ-RUAN** flew to Baltimore-Washington International Airport from Texas, for the purpose of collecting narcotics proceeds which were being stored in Maryland.

5. On February 8, 2004, in the early morning hours, in a car registered to **BARRONE, GONZALEZ-RUAN**, and others unknown to the grand jury, visited **JONES's** apartment, located at 9719 Summit Circle, Apartment 3B, Largo, Maryland, to count and collect these proceeds.

6. On or about February 9, 2004, **GONZALEZ-RUAN** and another co-conspirator whose identity is unknown to

the grand jury, abandoned the Summit Circle apartment rented by **JONES** and returned to Texas.

7. On January 10, 2004, **MAYNARD** rented 8550 Myrtle Avenue, Bowie, Maryland, for use by **MAYNARD**, **JONES**, **GONZALEZ-RUAN**, **BARRONE**, and others known and unknown to the grand jury as a stash location for substantial quantities of cocaine and money.

8. On January 10, 2004, **MAYNARD** provided falsified employment documents in connection with his rental of the house located at 8550 Myrtle Avenue, Bowie, Maryland.

9. In or about late February, 2004, **GONZALEZ-RUAN** and others known and unknown to the grand jury, used 8550 Myrtle Avenue, Bowie, Maryland, both as a stash house where they stored drugs and money, and packaged money for shipment back to Mexico, but also as a temporary residence while in the D.C. metro area.

10. On or about February 23, 2004, **GONZALEZ-RUAN** visited the 8550 Myrtle Avenue, Bowie, Maryland stash house rented by **MAYNARD** for the purpose of collecting narcotics proceeds which were stored there.

11. On February 28, 2004, in the early morning hours, **GONZALEZ-RUAN** returned to the 8550 Myrtle Avenue, Bowie, Maryland, stash house for the purposes of collecting narcotics proceeds stored there, but upon discovering signs of a break in at that location, fled the house at a high rate of speed.

12. On November 17, 2003, **JONES** rented a warehouse space located at 400 Hampton Park Boulevard, Capitol Heights, Maryland, for use as a stash location by **JONES**, **MAYNARD**, and their suppliers.

13. On November 17, 2003, **JONES** provided falsified employment documents in connection with his rental of the Hampton Park storage facility.

14. On April 5, 2005, **MAYNARD** drove to North Carolina, in a van registered to **JONES** containing in excess of $67,000, in cash hidden in a secret compartment, for the purposes of purchasing cocaine.

15. On April 20, 2005, **REYNA** and another co-conspirator whose identity is known to the grand jury, rented a house located at 9508 Potomac Drive, Ft. Washington, Maryland, for the purposes of storing substantial quantities of cocaine and money, which were intended for **JONES**, and for use as a temporary residence for **REYNA**, Bermea, Montelongo, and Sanchez-Gonzalez.

16. From time to time between April 20, 2005, and October 24, 2005, **BARRONE** visited the Potomac Drive house to check on the supply of cocaine, and on the individuals who were transferring the cocaine to **JONES**—**REYNA**, Bermea, Carillo-Montelongo, and Sanchez-Gonzalez.

Overt Acts from Wire Interception

17. On September 2, 2005, at 5:52 p.m., **JONES** arranged to meet with unindicted co-conspirator-3 at Sam's Carwash on Branch Avenue in Temple Hills, Maryland, for the purposes of a drug transaction.

18. On September 2, 2005, at 5:53 pm, **JONES** and this unindicted co-conspirator agreed to meet up the block at Circuit City in Temple Hills, Maryland, for the purposes of that drug transaction.

19. On September 2, 2005, at 5:55 p.m., **JONES** and Johnson discussed meeting at either Sam's Carwash or Wendy's on Branch Avenue in Temple Hills, Maryland, for the purposes of a drug transaction.

20. On September 2, 2005, at 6:31 pm, **JONES** and unindicted co-conspirator-3 met on Branch Avenue for the purposes of a drug transaction.

21. On September 2, 2005, at 7:20 pm, **JONES** and unindicted co-conspirator-1 agreed to meet at the Ford dealership on Branch Avenue in Temple Hills, Maryland for the purposes of a drug transaction.

22. On September 2, 2005, at approximately 7:30 pm, **JONES** and unindicted co-conspirator-2 met at a gas station near Branch Avenue in Temple Hills, Maryland, for the purposes of a drug transaction.

23. On September 5, 2005, at 4:44 p.m., **JONES** called **MAYNARD** and discussed in coded terms the fact that **MAYNARD** had forgotten to tell **JONES** that he received drug money from unindicted co-conspirator-4 and hid it.

24. On September 5, 2005, at 4:45 p.m., **JONES** called unindicted co-conspirator-4, and told her that **MAYNARD** had forgotten about it, and arranged to meet unindicted co-conspirator-4 later that day or the following morning for the purposes of a drug transaction.

25. On September 6, 2005, at 9:58 a.m., **JONES** went to the house of unindicted co-conspirator-4 for the purposes of a drug transaction.

26. On September 6, 2005, at approximately 12:30 p.m., **JONES** and Hunter met at Sam's Carwash on

Branch Avenue in Temple Hills, Maryland, and engaged in a drug transaction.

27. On September 6, 2005, at 2:08 p.m., **JONES** unindicted co-conspirator-4 discussed in code how much cocaine she needed, "three big VIP tickets."

28. On September 7, 2005, at 10:24 a.m., **JONES** called Adams and told him in coded terms to give a quantity of cocaine to **MAYNARD** who "knows what to do with it."

29. On September 7, 2005, at 10:25 a.m., **JONES** called **MAYNARD** and told him in coded terms that **MAYNARD** should get a quantity of cocaine from Adams and give it to unindicted co-conspirator-4.

30. On September 7, 2005, at 10:26 a.m., **JONES** called unindicted co-conspirator-4 and told her in coded terms that **MAYNARD** had a quantity of cocaine for her, and that **JONES** would have more cocaine for her—"another VIP"—later that day.

31. On September 7, 2005, at 9:05 p.m., **JONES** called unindicted co-conspirator-4 again, and she told **JONES** in coded terms that she needed less cocaine than she had thought—a "smaller ticket"—and they agreed to meet the next day for the purposes of this cocaine transaction.

32. On September 9, 2005, at 8:21 a.m., **JONES** called **CARTER** and in coded terms—"are you ready for halftime?"—asked whether **CARTER** was ready to conduct a cocaine transaction, and the pair agreed to meet at **CARTER**'s place of employment in 20 minutes.

33. On September 9, 2005, at 7:07 p.m., **JONES** called **CARTER** and the pair agreed to meet at Sam's Carwash on Branch Avenue in Temple Hills, Maryland.

34. On September 9, 2005, at 7:40 p.m., after another telephone conversation, **JONES** and **CARTER** met at a Chinese restaurant next door to Sam's Carwash on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

35. On September 10, 2005, **JONES** changed his cellular telephone number.

36. On September 10, 2005, in a series of eight calls beginning at 2:20 p.m., **JONES** called co-conspirators, including **CARTER** and **MAYNARD**, and gave them his new telephone number.

37. On September 10, 2005, at 5:51 p.m., **JONES** called **CARTER** and the pair agreed to meet at Sam's Carwash for the purposes of a cocaine transaction.

38. On September 10, 2005, after another telephone conversation, **JONES** and **CARTER** met at the McDonald's restaurant two doors down from Sam's Carwash on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

39. On September 15, 2005, at approximately 4:09 p.m., **JONES** called **CARTER** and the pair agreed to meet at Sam's Carwash on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

40. On September 15, 2005, at 4:35 p.m., **JONES** and **CARTER** met at Sam's Carwash on Branch Avenue in

Temple Hills, Maryland, for the purposes of a cocaine transaction.

41. On September 15, 2005, at approximately 4:40 p.m., **JONES** and **CARTER** departed Sam's Carwash and proceeded up the block to the parking lot of Circuit City, on Branch Avenue in Temple Hills, Maryland, to continue their discussion of a cocaine transaction.

42. On September 15, 2005, at 4:43 p.m., **JONES** called unindicted co-conspirator-1, and they agreed to meet at a gas station on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

43. On September 18, 2005, at 6:25 p.m., **JONES** called **REYNA** and said that he would arrive at the Potomac Drive house in 10 minutes.

44. On September 18, 2005, at 8:15 p.m., **JONES** and unindicted co-conspirator-3 agreed to meet at the car lot near Branch Avenue in Temple Hills, Maryland, within 10 minutes for the purposes of a cocaine transaction.

45. On September 18, 2005, at 8:15 p.m., **JONES** left a message for unindicted co-conspirator-2 to call him, for the purposes of a cocaine transaction.

46. On September 18, 2005, at 8:17 p.m., **JONES** called **CARTER** and told **CARTER** to meet him by the circle and the subway, near Branch Avenue in Temple Hills, Maryland.

47. On September 18, 2005, at 8:19 p.m., unindicted co-conspirator-2 called **JONES** back and they discussed in code quantities of cocaine that the co-conspirator might need—"little tickets" and "big VIPs."

48. On September 18, 2005, at 8:30 p.m., **JONES** and unindicted co-conspirator-3 met at a lot on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

49. On September 18, 2005, at 8:44 p.m., **JONES** called **CARTER** and agreed to wait for him for another 15 minutes, for the purposes of a cocaine transaction.

50. On September 20, 2005, at 10:45 a.m., **GARCIA** called **JONES** to discuss the timing of **GARCIA**'s next big shipment of cocaine to **JONES** in coded terms—"as soon as . . . we get through with this party, we'll take a couple weeks"; by then **JONES** will "have all the studio down and all the music down pat."

51. On September 26, 2005, at 6:35 p.m., **JONES** called **GARCIA** and told him in coded terms that he was collecting money from his customers in order to be able to purchase the next large quantity of cocaine which **GARCIA** was sending up from Texas.

52. On September 27, 2005, Bermea arrived at the Potomac Drive house to help in the distribution relationship with **JONES**.

53. On September 27, 2005, at 11:41 a.m., **CARTER** called **JONES** to arrange a meeting at Levels for the purposes of a drug transaction; **JONES** replied that he would call **MAYNARD** to let him know.

54. On September 27, 2005, at 11:44 a.m., **JONES** called **MAYNARD** and told him in coded terms that unindicted co-conspirator-3 was downstairs and had cocaine money and that **MAYNARD** should hold it for **JONES**.

55. On September 27, 2005, at 11:48 a.m., **JONES** called unindicted co-conspirator-3 and told him that **MAYNARD** was waiting for him at Levels.

56. On September 27, 2005, at 4:28 p.m., **JONES** called **CARTER** to confirm that **CARTER** had come to Levels.

57. On September 27, 2005, at 8:43 p.m., **JONES** called Adams in an effort to collect cocaine proceeds to give to **JONES's** Mexican suppliers, **REYNA, GARCIA, GONZALEZ-RUAN, BARRONE,** Bermea, and others known and unknown to the grand jury.

58. On September 27, 2005, at 8:47 p.m., **JONES** called unindicted co-conspirator-2 in an effort to collect cocaine proceeds to give to **JONES's** Mexican suppliers, **REYNA, GARCIA, GONZALEZ-RUAN, BARRONE,** Bermea, and others known and unknown to the grand jury.

59. On September 27, 2005, at 8:48 p.m., **JONES** called Johnson in an effort to collect cocaine proceeds to give to **JONES's** Mexican suppliers, **REYNA, GARCIA, GONZALEZ-RUAN, BARRONE,** Bermea, and others known and unknown to the grand jury.

60. On September 27, 2005, at 8:54 p.m., **JONES** called **REYNA** to tell him that he would come see **REYNA** at the Potomac Drive house later that evening.

61. On September 27, 2005, at 8:57 p.m., **JONES** called Adams again to inquire about the status of Adams's cocaine sales and money collection, telling Adams that he had to go visit the Potomac Drive house because he "didn't keep [his] word."

62. On September 27, 2005, at 9:25 p.m., **JONES** called unindicted co-conspirator-4 in an effort to collect cocaine proceeds to give to **JONES**'s Mexican suppliers, **REYNA, GARCIA, GONZALEZ-RUAN, BARRONE**, Bermea, and others known and unknown to the grand jury, saying "I'm trying to get these people to go."

63. On September 27, 2005, at 9:50 p.m., **JONES** arrived at the Potomac Drive house to deliver cocaine proceeds and to discuss the timing of the next shipment of cocaine, departing the house approximately one hour later.

64. On September 27, 2005, late in the evening, or in the early morning hours of September 28, 2005, **REYNA**, Bermea and others received a shipment of 16 kilograms of cocaine from **GARCIA, BARRONE, GONZALEZ-RUAN**, and others unknown to the grand jury.

65. On September 28, 2005, at 4:58 p.m., **REYNA** called **JONES** and asked whether **JONES** was coming to the Potomac Drive house, to which **JONES** replied that he would come out later on.

66. On September 28, 2005, at 5:28 p.m., **JONES** called unindicted co-conspirator-2 in an effort to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others.

67. On September 28, 2005, at 5:30 p.m., **JONES** told Adams in coded terms—"tell them I need a little help right now"—that he needed to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others.

68. On September 28, 2005, at 5:34 p.m., **JONES** called unindicted co-conspirator-3 in an effort to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others.

69. On September 28, 2005, at 5:35 p.m., **JONES** called unindicted co-conspirator-4 in an effort to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others.

70. On September 28, 2005, at 5:37 p.m., **JONES** called unindicted co-conspirator-1 in an effort to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others, whom he referred to as "my uncle."

71. On September 28, 2005, at 5:38 p.m., **JONES** called **CARTER** in an effort to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others, saying "I'm trying to make my rounds so I could, um, take care of something;" **CARTER** was still selling his "tickets."

72. On September 28, 2005, at 7:02 p.m., **REYNA** again called **JONES** to inquire when **JONES** was coming out to the Potomac Drive house, to which **JONES** replied that he was "trying to take care of something so I can come through there."

73. On September 28, 2005, at 7:28 p.m., **JONES** called unindicted co-conspirator-2 and told him that he was on his way to that co-conspirator's house.

74. On September 28, 2005, at 7:31 p.m., **JONES** called Johnson, in an effort to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others.

75. On September 28, 2005, at 8:12 p.m., **JONES** arrived at the house of unindicted co-conspirator-2 to col-

lect cocaine proceeds to deliver to **REYNA**, Bermea and others, and remained for 20 minutes.

76. On September 28, 2005, at 8:32 p.m., **JONES** arrived at Adams's house, a few blocks from the house of co-conspirator-2, to collect cocaine proceeds to deliver to **REYNA**, Bermea, and others, and remained for 20 minutes.

77. On September 28, 2005, at 9:10 p.m., unindicted co-conspirator-1 called **JONES** and they agreed to meet in a few minutes at the CVS on Branch Avenue in Temple Hills, Maryland, a short distance from Adams's house.

78. On September 28, 2005, at 9:35 p.m., **JONES** arrived at the Potomac Drive house to deliver cocaine proceeds to **REYNA**, Bermea, and others, and to collect more cocaine, departing at 10:15 p.m.

79. On September 28, 2005, at 10:18 p.m., as he was leaving the Potomac Drive house, **JONES** called unindicted co-conspirator-3 who indicated that he wanted "two."

80. On October 5, 2005, in a series of coded telephone conversations beginning at 1:10 p.m., **JONES** and Adams discussed a discrepancy in cocaine proceeds that Adams gave to **JONES**, with **JONES** saying that he and **MAYNARD** went over the calculations twice, and that Adams had not given **JONES** enough money for the cocaine Adams had received from **JONES**.

81. On October 8, 2005, at approximately 11:25 a.m., **JONES** called Bermea, who informed **JONES** that the latest shipment of cocaine had been delayed.

82. On October 8, 2005, at 12:44 p.m., **JONES** called a co-conspirator whose identity is unknown to the grand jury, and told that person that the cocaine shipment had been delayed—"the rain delayed the party"—but that it would likely be in tomorrow.

83. On October 8, 2005, at 12:46 p.m., **JONES** called unindicted co-conspirator-3 and told him that he had talked to his "uncle" and that the cocaine shipment had been delayed—"the rain delayed the party."

84. On October 8, 2005, at 7:38 p.m., **JONES** called unindicted co-conspirator-2 and told him that "they cancelled out for today."

85. On October 9, 2005, at 11:14 a.m., **JONES** called Bermea, who informed **JONES** that he would call him as soon as the cocaine arrived.

86. On October 10, 2005, at 9:34 p.m., Bermea called **JONES** and told him that the cocaine would arrive in four hours.

87. On October 11, 2005, in the early morning hours, a shipment of 10 kilograms of cocaine arrived from the suppliers in Mexico.

88. On October 11, 2005, at 7:39 a.m., **JONES** called Bermea who informed **JONES** that the cocaine had arrived.

89. On October 11, 2005, at 7:41 a.m., **JONES** left a message for unindicted co-conspirator-1 to call him.

90. On October 11, 2005, at 7:46 a.m., **JONES** called Adams in an effort to meet for a cocaine transaction.

91. On October 11, 2005, at 7:49 a.m., **JONES** called unindicted co-conspirator-2 in an effort to arrange a cocaine transaction.

92. On October 11, 2005, at 7:56 a.m., **JONES** called unindicted co-conspirator-3 and they made plans to meet later for the purposes of a cocaine transaction.

93. On October 11, 2005, at 7:58 a.m., **JONES** called Johnson and they made plans to meet later for the purposes of a cocaine transaction.

94. On October 11, 2005, at 8:27 a.m., **JONES** agreed to meet with unindicted co-conspirator-1 at the CVS on Branch Avenue in Temple Hills, Maryland, to engage in a cocaine transaction.

95. On October 11, 2005, at 9:15 a.m., **JONES** called Bermea again and told him that he would arrive at the Potomac Drive house in approximately 20 minutes.

96. On October 11, 2005, at approximately 9:45 a.m., **JONES** arrived at the Potomac Drive house, where he dropped off cash, and collected cocaine, and departed at approximately 11:41 a.m.

97. On October 11, 2005, at 11:54 a.m., **JONES** agreed to meet with Adams at his house, and arrived shortly thereafter, for the purposes of a cocaine transaction.

98. On October 11, 2005, in the evening, **JONES** met with three different unindicted co-conspirators, whose identities are known to the grand jury, for the purposes of drug transactions.

99. On October 12, 2005 at 12:36 p.m., Bermea called **JONES** and told him in code that another shipment of

cocaine was en route and would arrive the following night—"the girls are coming tomorrow night."

100. On October 12, 2005, at approximately 12:44 p.m., **JONES** called Adams and told him that the cocaine was coming the following night—"sometime tomorrow."

101. On October 12, 2005, at approximately 12:47 p.m., **JONES** called an unindicted co-conspirator, whose identity is known to the grand jury, and told him in coded terms that the cocaine was coming the following night—"your uncle is going to talk to me tomorrow."

102. On October 12, 2005, at approximately 1:40 p.m., **JONES** called unindicted co-conspirator-2 and told him "sometime tomorrow, man."

103. On October 12, 2005, at approximately 3:05 p.m., **JONES** called unindicted co-conspirator-1 and told him in coded terms that the cocaine would arrive the following day—"tomorrow, your uncle, tomorrow."

104. On October 12, 2005, at approximately 9:18 p.m., **JONES** told unindicted co-conspirator-3 in coded terms that the cocaine would arrive the following day—"your Uncle was talking to me and he is supposed to be in tomorrow."

105. The next day, on October 13, 2005, at approximately 2:53 p.m., **JONES** told **CARTER** in coded terms that he expected a cocaine shipment that evening—"might be this evening, your cousin was telling me this evening."

106. On October 13, 2005, at approximately 5:25 p.m., in a coded conversation Bermea told **JONES** that he was going to pick up the cocaine shipment later—"going to

meet the girls"—that evening; **JONES** replied that he needed "20 out of the VIP tickets."

107. On October 13, 2005, late in the evening, 65 kilograms of cocaine, sent by **GONZALEZ-RUAN, BARRONE, GARCIA**, and others unknown to the grand jury, arrived by tractor-trailer into the D.C. area, and Bermea collected them and transported them to the Potomac Drive house.

108. On October 14, 2005, at approximately 7:03 a.m., **JONES** arrived at the Potomac Drive house to drop off cash and collect cocaine, and remained until 8:16 a.m.

109. On October 14, 2005, at approximately 8:16 a.m., as he was leaving the Potomac Drive house in possession of a large quantity of cocaine, **JONES** called **CARTER** in an effort to arrange a cocaine transaction.

110. On October 14, 2005, at 8:17 a.m., **JONES** called unindicted co-conspirator-3 and they agreed to meet by the Circle on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

111. On October 14, 2005, at 8:19 a.m., **JONES** called Johnson, and they agreed to meet at the Circle by Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

112. On October 14, 2005, at 8:21 a.m., **JONES** called unindicted co-conspirator-2 in an effort to arrange a cocaine transaction.

113. On October 14, 2005, at approximately 9:21 a.m., **JONES** went to Adams's house to drop off cocaine.

114. On October 14, 2005, at 9:35 a.m., **JONES** called **CARTER** again and told him "whenever you ready."

115. On October 14, 2005, at approximately 10:23 a.m., **JONES** went to unindicted co-conspirator-2's house for the purposes of a cocaine transaction.

116. On October 14, 2005, at approximately 10:30, **JONES** met with Johnson at the Circle on Branch Avenue in Temple Hills, Maryland, for the purposes of a cocaine transaction.

117. On October 14, 2005, at approximately 10:45 a.m., **JONES** met with unindicted co-conspirator-3 for the purposes of a cocaine transaction.

118. On October 14, 2005, at approximately 10:49 a.m, **JONES** called unindicted co-conspirator-4 and told her that he was "talking to [her] uncle."

119. On October 14, 2005, at approximately 11:30 a.m., Hunter met with **JONES** at Levels, and gave him $5,750, as advanced payment for a quarter-kilogram of cocaine, and **JONES** promised to call Hunter later that day when he had more cocaine available.

120. On October 14, 2005, in the early evening, **JONES** met with Bermea at the Potomac Drive house, dropped off cash, and picked up more cocaine.

121. On October 14, 2005, at approximately 6:45 p.m., **JONES** called **CARTER** and left a message for **CARTER** to give him a call.

122. On October 14, 2005, at approximately 8:05 p.m., **JONES** and Johnson agreed to meet in 15 minutes "where [they] were at this morning" for the purposes of a drug transaction.

123. On October 14, 2005, at approximately 8:06 p.m., **JONES** called Adams and told him he needed to pick something up from Adams.

124. On October 14, 2005, at approximately 8:46 p.m., **JONES** called Hunter and left a message for Hunter to call him.

125. On October 14, 2005, at approximately 8:48, **JONES** visited unindicted co-conspirator-2's house for the purposes of a cocaine transaction.

126. On October 15, 2005, at approximately 3:38 p.m., **JONES** met with **CARTER** for the purposes of a cocaine transaction.

127. On October 17, 2005, at approximately 4:51 p.m., **JONES** spoke with **CARTER** in a coded conversation in which **JONES** told **CARTER** that half-kilograms of cocaine cost $10,500, at which **CARTER** expressed surprise.

128. On or about Wednesday, October 19, 2005, at approximately 11:13 a.m., **GARCIA** left a coded message for **JONES** that a shipment of cocaine would be arriving on Thursday or Friday—"the DJ is already on the way to your club, they'll getting there by, uh, Thursday or Friday, by Friday."

129. On Wednesday, October 19, 2005, at approximately 11:15 a.m., **JONES** and **GARCIA** spoke in a coded conversation, and **GARCIA** reiterated that a shipment of cocaine would be arriving on Thursday or Friday.

130. On October 19, 2005, at approximately 5:19 p.m., **JONES** and Bermea had a conversation in which Bermea stated that he was home, and **JONES** stated that he would call him later.

131. On Thursday, October 20, 2005, at approximately 6:25 p.m., **JONES** visited the Potomac Drive house for approximately one hour and 20 minutes.

132. Late in the evening on Friday, October 21, 2005, or in the early morning hours of Saturday, October 22, 2005, 80 kilograms of cocaine from **GONZALEZ-RUAN, BARRONE, GARCIA**, and others unknown to the grand jury, arrived in the D.C. area, and Bermea and others transported it to the Potomac Drive house.

133. On October 23, 2005, at approximately 7:56 p.m., **JONES** spoke with unindicted co-conspirator-2 and stated in a coded reference that he had to make contact with his customers—"goin' to make my rounds now so I can take care of it"—because cocaine was available.

134. On October 23, 2005, in the evening, **JONES** and unindicted co-conspirator-2 met and that co-conspirator gave **JONES** cash as advanced payment for a quantity of cocaine.

135. On October 23, 2005, at approximately 8:48 p.m., **JONES** told Adams that he would arrive at Adams's residence in a few minutes.

136. On October 23, 2005, in the evening, **JONES** met with Adams, who gave **JONES** approximately $20,000, as advanced payment for a kilogram of cocaine.

137. On October 23, 2005, at approximately 8:08 p.m., **JONES** called **CARTER** and in a coded conversation they agreed to get together that night for the purposes of a cocaine transaction.

138. On October 23, 2005, at approximately 9:25 p.m., **JONES** and **CARTER** met and **CARTER** gave **JONES** cash as advanced payment for a quantity of cocaine.

139. On October 23, 2005, at approximately 10:07 p.m., **JONES** told unindicted co-conspirator-3 in a coded conversation that the cocaine shipment had arrived—"out here making my rounds, slim, trying to make my rounds, so I can take care of those contracts for that band"—and they agreed to meet the following morning.

Search Warrants

140. On October 24, 2005, at his home in Waldorf, Maryland, **JONES** was in possession of in excess of $69,000, in cash, which he had recently collected from his customers, and which he was planning to deliver to Bermea as payment for a quantity of cocaine.

141. On October 24, 2005, at his home in Landover, Maryland, unindicted co-conspirator-1 was in possession of proceeds from drug sales totaling $2,743, approximately 4 grams of crack cocaine, derived from cocaine which he had obtained from **JONES**, and a loaded handgun.

142. On October 24, 2005, Adams was in possession of approximately 115 grams of cocaine, which he had obtained from **JONES**, along with two handguns and $9,600, in cash, which was proceeds from earlier drug sales.

143. On October 24, 2005, the Suitland, Maryland house of unindicted co-conspirator-2 contained approximately 130 grams of cocaine, which the co-conspirator had obtained from **JONES**, along with $10,750, in cash, which was proceeds from earlier drug sales, and a digital scale and other drug packaging materials.

144. On October 24, 2005, at his home in Waldorf, Maryland, Johnson was in possession of approximately one-half kilogram of cocaine, which he had previously obtained from **JONES**, along with **$12,545**, in cash, and a digital scale and other drug packaging materials.

145. On October 24, 2005, the house at 9508 Potomac Drive, Ft. Washington, Maryland, contained 97 kilograms of cocaine, individually packaged and secreted in several duffel bags, 549 grams of crack cocaine, in excess of $850,000, at least $700,000, of which was packaged in heat sealed bundles and secreted in duffel bags, heat sealing equipment and wrappers, ledger books and pay sheets, and several air mattresses, along with Carillo-Montelongo, Sanchez-Gonzalez, and Bermea, who was attempting to exit through an elevated bathroom window in the rear of the house.

146. On October 25, 2005, **CARTER**'s home in Southeast, Washington, D.C. contained drug packaging equipment, including two digital scales, a strainer coated with cocaine residue, and numerous empty ziplock baggies, along with assorted ammunition and shotgun shells.

(**Conspiracy to Distribute and Possess With Intent to Distribute Five Kilograms or More of Cocaine and Fifty Grams or More of Cocaine Base**, in violation of Title 21, United States Code, Section 846)

FORFEITURE ALLEGATION

Upon conviction of the controlled substance offense alleged in Count One of this Indictment, defendant **ANTOINE JONES** shall forfeit to the United States pursuant to 21 U.S.C. § 853, any property constituting, or derived from, proceeds obtained, directly or indirectly,

as a result of the said violation and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the said violation, including but not limited to the following: MONEY JUDGMENT—a sum of money equal to $1,000,000, in United States currency, representing the amount of proceeds obtained as a result of the offense, Conspiracy to Distribute and Possess with Intent to Distribute Five Kilograms or More of Cocaine, and Fifty Grams or More of Cocaine Base.

If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty; it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property described above.

All in accordance with 21 U.S.C. § 853 and Rule 32.2 of the Federal Rules of Criminal Procedure.

(**Criminal Forfeiture**, pursuant to Title 21, United States Code, Section 853)

A TRUE BILL:

FOREPERSON.

Attorney of the United States in
and for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 05-386-01
USM Number 18600-016

UNITED STATES OF AMERICA

v.

ANTIONE JONES

[Filed: May 5, 2008]

JUDGMENT IN A CRIMINAL CASE

EDUARDO BALAREZO, ESQUIRE
Defendant's Attorney

[NANCY MAYER WHITTINGTON, CLERK
U.S. District Court]

THE DEFENDANT:

☐ **pleaded guilty to count(s)** _____

☐ **pleaded nolo contendere to count(s) which was accepted by the court.** _____

■ **was found guilty on count(s)** ONE (1) OF A SUPERSIDING INDICTMENT **after a plea of not guilty.**

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. 851, 846 & 841	CONSPIRACY TO DISTRIBUTE AND POSSESS WITH THE INTENT TO DISTRIBUTE 5 KILOGRAMS OR MORE OF COCAINE AND FIFTY GRAMS OR MORE OF COCAINE BASE.	10/24/05	1

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____

■ Count(s) ALL REMAINING COUNTS is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

MAY 2, 2008
Date of Imposition of Judgment

/s/ ELLEN S. HUVELLE
ELLEN S. HUVELLE
Signature of Judge

ELLEN S. HUVELLE, U.S. District Court Judge
Name of Judge

5/2/08
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

LIFE IN PRISON ON COUNT-1, TO RUN CONCURRENT WITH SENTENCE IMPOSED IN CR 94-194.

■ The court makes the following recommendations to the Bureau of Prisons:

PLACEMENT IN A FEDERAL CORRECTIONAL INSTITUTION IN THE VICINITY OF MADISON, ALABAMA.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

TEN (10) YEARS ON COUNT-1.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the de-

fendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

THE PROBATION OFFICE SHALL RELEASE THE PRESENTENCE INVESTIGATION REPORT TO ALL APPROPRIATE AGENCIES IN ORDER TO EXECUTE THE SENTENCE OF THE COURT.

NOTICE OF APPEAL - YOU HAVE THE RIGHT TO APPEAL THE SENTENCE IMPOSED BY THIS COURT. IF YOU CHOOSE TO FILE AN APPEAL, YOU MUST DO SO WITHIN 10 DAYS AFTER THE COURT HAS ENTERED JUDGEMENT IN THIS CASE. IF YOU ARE UNABLE TO AFFORD THE COST OF AN APPEAL, YOU MAY REQUEST PERMISSION FROM THE COURT TO FILE AN APPEAL AT THE EXPENSE OF THE GOVERNMENT.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 2,000.00	$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or

fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

■ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

■ the interest requirement is waived for the

■ fine ☐ restitution.

☐ the interest requirement for the

☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Nov. 20, 2007
2:35 p.m.

PM SESSION
VOLUME TWO
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

For the Government: JACK GEISE, Esquire
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(202) 616-9156

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Washington, D.C. 20001

For Defendant Maynard: JAMES L. LYONS, Esquire
Kellogg, Williams & Lyons
1350 Connecticut Avenue, NW
Suite 600
Washington, D.C. 20036
(202) 496-0722

[90]

* * * * *

Q. Does the bureau actually, that's it—let me ask you a question in terms of devices. Does the bureau actually have devices that are used for tracking?

A. Yes, we do.

Q. Would you tell us are some of those actually designed by the FBI?

A. Yes, they are.

THE COURT: Were any used in this case?

THE WITNESS: Yes, they were.

THE COURT: What kind?

THE WITNESS: The wireless tracking device meaning that it's, it uses the cellphone to gather the data to bring back or track you live seeing where you're at right now.

[91]

BY MR. GEISE:

Q. Let me just ask you a little bit about, although we all have GPSs in our car?

THE COURT: I don't.

MR. GEISE: Well, many of us do.

BY MR. GEISE:

Q. Just very briefly, how does a GPS system work?

A. Actually, it has a GPS receiver inside the unit. It has a unit with an antenna to look at the satellites which are up in the air. And it actually—your receiver gets the information up to the satellite and plots you on a map which we call latitude and longitude to go and put you on a mapping system.

Q. Just a question I know, but U.S. put the satellites up for this purpose?

A. That's correct.

Q. How does the GPS system track on these satellites, in very simple terms for all of us?

A. There's at any given day, there's approximately 18 satellites working. We have to have three of those satellites that the GPS receiver has to talk to, to get us in a position.

Q. There's a radio signal from those satellites?

A. A radio signal comes down from those satellites and the GPS receiver receives those radio signals.

Q. Let me just ask in the fall of 2005 which is the time relevant to this case, were you actually, did you actually [92] monitor and send out the particular devices that were used by the FBI in these cases?

A. Yes, we did.

Q. Are you aware of the particular device that was used in the Jones case?

THE COURT: Wireless tracking device.

MR. GEISE: Wireless tracking device. GPS.

THE WITNESS: Yes.

THE COURT: He testified.

BY MR. GEISE:

Q. Let's talk about the particular unit here. In very simple terms how does that work?

A. That describes the same way. It's a device with a GPS antenna meaning that we're looking at GPS satellites and also has a couple of antennas for communicating with a cellphone.

Q. Now let's talk about both aspects of that.

Was this piece of equipment perfectly accurate? That is, can you it tell you exactly where you are?

A. Yes, it could. Minus fifty to a hundred feet.

Q. Now you say it varies 50 to a hundred feet. Why is that?

A. Because of obstruction, if there's obstruction on there and the satellite is moving and you're moving, it gives you a variance.

Most of the commercial, commercial systems that we have out there correct those different positions that put you right on [93] the road. We give you the raw data to plot it back on the mapping system.

Q. When you say plot it on the mapping system, is there computer software that actually takes the longitude and latitude and gives you an address?

A. Yes, it is.

Q. Does the FBI have software it uses for this?

A. Yes, we do.

Q. You say it's accurate within fifty to a hundred feet?

A. That's correct.

Q. So the address actually would vary a little?

A. Yes, it would.

Q. Now just a couple of other questions.

The same technology is, what other purposes does it serve, not just the tracking but the GPS technology?

A. It navigates ships, planes, buses, anything that's carrying, anything that you want to direct you to a location. Navigates.

Q. We are talking about GPS in our cars, every one is aware of them. Let me ask you a couple of questions about this particular system that might be different than what we're use to.

You say a cellphone connection is part of the system. What's the purpose of this?

A. The cellphone connection is actually to communicate from a [94] laptop which we explain has the mapping system. You can go out there to that GPS unit that is on the vehicle in something and bring those live locations back to you.

Q. So the laptop can communicate with the GPS device?

A. That's correct.

Q. These particular GPS device here, what's its purposes?

A. It's purpose is to track you. It stores data. Meaning that it stores actual longitude, latitude to show where someone has gone. You can also bring that data back to your mapping system and plot it on your mapping system or else you can go out there and reach it, the GPS device and you can see where that vehicle is at right now.

Q. The GPS in my car, if I want to know where it is, if I wanted to know where it is, are these devices so that the person driving the car can know what GPS is on the car?

A. No it's not.

Q. Why is that?

A. Can you explain?

Q. Well, it's an obvious question.

These devices are to do what?

A. These devices are to track a persons without the person knowing.

Q. Without the person knowing it?

A. Without the person knowing it.

Q. Without going into detail about how they're installed.

[95] Are there teams of agents that go out and install these devices?

A. Yes, there are.

Q. This particular device, how is it powered?

A. It was battery powered.

Q. Does that create certain limitations on the device?

A. Yes, it does.

Q. Would you just explain to the jury what those limitations are?

A. The limitations that the battery runs out. If you're actually looking at the device all the time seeing where it's at your batteries will actually die on you because it's actually using the batteries up. The longer you're connected to it the quicker the batteries will wear out.

Q. What's the problem if the battery run out?

A. The whole unit will go dead. You won't be able to communicate with that tracking device.

Q. What would you have to do to make it work?

A. You would have to go back out there and replace the batteries that you previously put in there.

Q. Why do you want to do that too often?

A. You can alert whoever that you're on the go, getting another vehicle to replace the batteries on that device.

Q. Now, there's some features of the device that are designed to try to conserve battery power?

[96]

A. Yes.

Q. Would you just tell us about those a little bit?

A. There's a, so that device is not on all the time we put it in a sleeping mode, meaning that when the vehicle stops, that GPS turns off. It's not using any battery power.

When that vehicle starts moving again, that system comes back up and it's available for someone to actually view it.

Q. Now you say when it stops. If it stops at a stop sign or stoplight?

A. It doesn't stop there. It keeps on, it's always on.

Q. How long does it take for the vehicle, for the equipment to turn itself off?

A. It all depends on who actually set the device. It could take as long as from five to 15 minutes to acquire back a latin longitude to place you on the map.

Q. If I park my car and I have one of these devices hidden in my car, will it turn itself off eventually?

A. Yes, it would.

Q. But you say it takes a little while to wake up?

A. Right, require GPS signal, cell signal, things like that.

Q. Now after—just a couple of other questions about this. You mentioned a device seeing the satellites. The

* * * * *

[98]

* * * * *

Q. What kind of things can they do with that when they watch it?

A. They can actually, they can actually call the units. Meaning that they can use their cellphones, call into a unit displayed on the map.

They can look at historical information, see where the vehicle has been within the last, since it's been on by days by time. They can actually print out a report that actually has the addresses on there.

* * * * *

[99]

* * * * *

Q. Right. And the particular device that was used in this case was a CGB 1?

A. That is correct.

* * * * *

[103]

* * * * *

Q. Is it accurate to say that this device that was used in this case, this is C G, C G D 1 is what's called a legacy device?

A. That is correct.

Q. A legacy device is what?

A. An older model that we came up with.

Q. In fact, newer models are much more accurate, right?

A. That is correct.

* * * * *

[107]

* * * * *

Q. All right.

Similar to the function where the device goes to sleep let's say, once it's asleep is there a way by which it can wake up again?

A. Yes, yes there is.

Q. How does that work?

A. It detects motion.

Q. Okay.

[108]

So basically let's say the device went to sleep after five minutes and the vehicle is parked wherever it stopped. The vehicle starts moving again, is that when it picks up again?

A. There could be a bunch of different things. The vehicle could start moving, it could go by wind if the wind is blowing hard enough it could wake up. If someone taps the vehicle, it could wake up. There's any time—

Q. It's very sensitive?

A. Any time it detects motion it could wake up.

* * * * *

[112]

* * * * *

Q. Now Mr. Balarezo asked you about some of the commercial ones we see and you were describing them.

Why does the FBI's device give you raw data rather than this corrected data that you were describing for the kind of things that we see in our car?

A. Because we want to give you true data. I mean, if it does [113] plot 100 feet away, 200 feet away, we want you to see that.

We don't correct none of that so if, I don't know if they'll show the data. But if sitting at one location, there's a bunch of different plots all around the maps. Every time it looks to see the GPS. I think this one was to plot at five thirty, ten seconds.

Q. So the wand in my car is fudging the data?

A. It is, it is fudging the data.

Q. And the FBI one does not fudge the data?

A. That's correct.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANTOINE JONES AND LAWRENCE MAYNARD,
DEFENDANTS

Nov. 21, 2007
9:40 a.m.

AM SESSION
VOLUME 3
TRANSCRIPT OF JURY TRIAL BEFORE THE
HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: **JOHN V. GEISE, Esquire**
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Defendant Maynard: JAMES LAWRENCE LYONS, Esquire
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1350 Connecticut Avenue, NW
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Washington, D.C. 20036
202-496-0722

• • • • •

[29]

• • • • •

Q. I'm going to show you what's at the moment marked for identification as Government's Exhibit WT 7. And what is WT 7?

A. They are the transcripts.

Q. Those aren't transcripts of however many thousands of calls?

A. No, they are not.

Q. Just of selected calls?

A. Correct.

Q. They were prepared in the fashion that you described?

A. Yes.

Q. Now, is there one section on each transcript that you were personally responsible for reviewing?

A. Yes, yes, there was.

THE COURT: Next week you're going to have copies of that for everybody?

MR. GEISE: Actually, your Honor, I think we probably have copies for everybody now. We could get them now and hand them out.

THE COURT: Only if you're starting to play calls.

[30]

MR. GEISE: We will later today, and it might make it a little easier to just illustrate what the agent's talking about at the top.

THE COURT: Any objection, Mr. Lyons, Mr. Balarezo?

MR. BALAREZO: Hold on.

THE COURT: These are the transcript books.

MR. GEISE: For this purpose, why don't we use WT 7, and without objection from counsel, let me just use the first call, which is page 0001 of the books, and just illustrate the one portion that you reviewed on each transcript, and if I might, counsel, give these to the jury just for the top portion.

THE COURT: You're not passing these books out yet, is that what you're saying? Are you ready?

MR. GEISE: Yes, your Honor.

BY MR. GEISE:

Q. I'm just going to ask you to testify to a portion of each transcript.

THE COURT: Can we turn on the monitors for the jury?

MR. BALAREZO: Let me see what it looks like.

THE COURT: It just shows the left corner.

MR. BALAREZO: That's fine.

THE COURT: All right. If we're going to hand out the books on Monday, make sure you've looked at what you want to review.

MR. BALAREZO: Right.

[31]

THE COURT: So that we don't have any problems, we'll just hand them out.

MR. GEISE: We may hand them out later today, your Honor, with another witness, so you may have to deal with a couple of issues that have arisen, but for now I think we're fine with this witness.

THE COURT: Okay.

BY MR. GEISE:

Q. Now, you mentioned that various people prepared the actual transcripts?

A. Correct.

Q. Now, is there one portion on each transcript that you reviewed personally?

A. Yes.

Q. Would you just describe what that is?

A. That's the header of each transcript, which tells you the date, the time of the phone call, whether it was outgoing, meaning the target phone called another number, or whether it was incoming, meaning that that other phone called the target phone, and then the session number.

Q. And also the phone number?

A. Well, the phone number of whoever was calling or being called.

Q. And how do you know the phone number of the person calling the target line or who the target line is calling?

[32]

A. The system picks that up.

Q. And so what you reviewed on each of these is the date, time, whether it was outgoing or incoming, and the phone number that was communicating, whether incoming or outgoing with the target phone?

A. Correct.

Q. And also the session number?

A. Correct.

Q. And have you reviewed all of those and compared them to the database?

A. Yes.

Q. And absent some possible typo, are they all accurate?

A. They are.

MR. GEISE: The Court's indulgence for a moment, your Honor.

(There was a pause in the proceedings.)

MR. GEISE: No further questions for this witness, although Special Agent O'Brien will be recalled on different matters.

Actually, your Honor, the Court's indulgence for just one moment.

BY MR. GEISE:

Q. Special Agent O'Brien, I'd like to turn briefly to another role you played in this investigation and turn your attention to late September of 2005, September 27th, I believe, of 2005, and [33] what was your assignment that day in this investigation?

A. We were anticipating, based on a phone call, we were anticipating being able to place a GPS on Mr. Jones' vehicle.

Q. Now, there's been testimony, the jury's already heard it yesterday, I believe. What's a GPS?

THE COURT: We know.

THE WITNESS: So my role was in being able to surveil, post-surveil Mr. Jones to a location where we felt we could put that GPS on his vehicle without being seen.

BY MR. GEISE:

Q. And based on the phone call what were you anticipating?

A. That he was going to a location at the time, we did not know where, to meet with his wife, and so we thought we would have an opportunity at that point maybe to put it on his vehicle.

Q. And what kind of opportunity do you need for them to put a GPS on a vehicle?

A. Well, we needed for him obviously to leave it somewhere in which it would provide us enough security and opportunity and time to put it on his vehicle.

Q. And where were you positioned initially on that day?

A. Initially I was—the vehicle ended up in a business park, parked kind of out in front of this high-rise building. Initially I was on the backside of that building.

Q. Well, let's start a little earlier. Where did you first [34] pick up the target vehicle?

A. Agents located the vehicle in front of Club Levels, which was on Montana Avenue. I took a position right at New York Avenue and Bladensburg at the Exxon.

Q. What time of day was this?

A. It was definitely before lunch. It was like late morning time, somewhere.

Q. You said you were positioned where?

A. At the Exxon station, because at that point we did not know where Mr. Jones was going to go so we had agents kind of covering different routes of travel, whether he went inbound, outbound, so I picked up

Mr. Jones as he passed the Exxon station heading outbound on New York Avenue.

Q. Let me ask. At the time did you have a camera with you?

A. No.

Q. Would you have had a camera with you?

A. No.

Q. Now, what was your purpose?

A. Our purpose was, is really to put that vehicle somewhere where our tech agents were able to put the GPS on his vehicle, and basically provide security for the tech agents.

Q. So there wasn't any intention of you photographing the car at that time?

A. No.

Q. Let me show what you has already been marked.

[35]

MR. GEISE: I believe I marked it for identification, your Honor, as photo 20.

THE COURT: Any objection to photo 20?

Have you seen it?

MR. GEISE: I think we used it yesterday, your Honor.

THE COURT: Is it in evidence?

MR. GEISE: Not yet. I think I'm going to move it into evidence in a minute.

BY MR. GEISE:

Q. Special Agent O'Brien, may I ask you, do you recognize photo 20?

A. Yes.

Q. What is photo 20?

A. That's Mr. Jones' Jeep Cherokee.

Q. During the course of the investigation did you actually see Mr. Jones driving this Jeep Cherokee on a number of occasions?

A. Yes.

Q. And does this fairly and accurately represent what that vehicle looked like?

A. Yes.

MR. GEISE: Your Honor, I move the admission of Government's Exhibit photo 20.

THE COURT: Any objection?

MR. BALAREZO: No.

THE COURT: All right, 20 will be admitted.

[36]

(Government Exhibit No. 20 was admitted into evidence at about 10:31 a.m.)

BY MR. GEISE:

Q. You were describing where you were positioned and what you saw. Would you please continue?

A. As Mr. Jones headed outbound on New York Avenue, meaning out towards Maryland, agents, there were several, I don't even remember how many vehicles we had out there that day, but we just basically followed in line.

Q. Were you able to see when he drove by the gas station?

A. Yes, I was.

Q. It was actually Mr. Jones?

A. Yes, it was.

Q. What did you do then?

A. There were already agents that were kind of tucked in behind him so I just kind of took a position up a little bit further back, anticipating that somewhere along the route we would change positions in an attempt obviously not to be seen.

Q. Do you, when you're doing surveillance, do you generally follow somebody and you're the only car following them for a long distance?

A. Yes, that's usually not a very good idea.

Q. Why is that really not a good idea?

A. Unless you want them to know you're following them.

Q. Which is usually not your purpose?

[37]

A. That is not our purpose. No, it was not our purpose.

Q. So you just described where you all eventually ended up?

A. We ended up in Maryland at a business park. There was a post office there. There were some high-rises, meaning six, seven-, eight-story buildings, and it was kind of in a circular fashion. There was a little mall and then kind of like a strip business park kind of surrounding those high-rises.

Q. And where were you initially positioned in your vehicle when you first got to this area?

A. Initially when I got to that area I went around to the backside of the building. Mr. Jones had moved a couple of times so we were kind of trying to stay far enough away but close enough so that we could see where he would settle in and then what he would do, anticipating that at some point he was going to meet his wife, like the phone call had indicated.

Q. And what happened then?

A. At some point other agents were able to—they observed Mr. Jones get out of his vehicle, get into his wife's vehicle.

MR. BALAREZO: Your Honor, objection as to what other agents saw.

THE COURT: Yes.

BY MR. GEISE:

Q. Where were you positioned at this point?

A. In the backside of the business, the high-rise.

Q. Were you able to hear what the other agents were saying on [38] the phone?

A. Yes.

Q. On the radio, I should say.

A. Yes, I was.

Q. At some point did you respond based on what they were saying?

A. Yes.

Q. At some point did you do something based on what they were saying?

A. Yes, I did.

Q. And what did you do?

A. I moved around to the front side of the building. There's a kind of a street and then on the other side there's kind of a little berm and then a parking lot, so I pulled over there and was facing the high-rise and the parking lot.

Q. Could you see vehicle Photo No. 20, Defendant Jones' car in that parking lot?

A. Yeah. Mr. Jones' vehicle was actually—we were kind of facing each other with the street separating us.

Q. And was he in there?

A. No, he was not.

Q. Was anyone in the vehicle?

A. No.

Q. Was Mr. Jones anywhere to be seen near?

A. No.

[39]

Q. What happened at that point?

A. The tech agents came. There was a spot next to Mr. Jones' parking spot. They got out, they did something to the car, took maybe five minutes or so, and they got back in their car and we left.

MR. GEISE: No further questions of this witness at this time, your Honor.

THE COURT: Any questions?

MR. BALAREZO: Just a few, your Honor. Thank you.

CROSS-EXAMINATION

BY MR. BALAREZO:

Q. Good morning, agent. How are you?

A. Good.

Q. You just in response to questions by Mr. Geise, this is in evidence, Government's No. 20. Do you see that?

A. Yes.

Q. He asked you a question about where did you see Mr. Jones' vehicle in relation to this picture, and you testified you saw Mr. Jones' vehicle wherever you saw it, right? You refer to it as Mr. Jones' vehicle?

A. I referred to that picture as Mr. Jones' vehicle. Where I saw his vehicle in relation to Mr. Geise's question was I saw his vehicle as it passed me on New York Avenue.

Q. But my point is, you refer to this vehicle as Mr. Jones' vehicle, right?

[40]

A. Yes.

Q. Just so we're all clear about what we're talking about, Mr. Jones may use this vehicle, but it's not his vehicle, it's registered to his wife; is that right, you're aware of that?

A. I am aware of that.

Q. So when you say "Mr. Jones' vehicle," it's a vehicle that he uses but not necessarily owns, right?

A. I don't know that property works that way in marriages, but if that's what you'd like to, it's registered to Mrs. Jones.

Q. Right. The registered owner of the vehicle is who?

A. The primary driver is Mr. Jones.

Q. Who is the registered owner of the vehicle?

A. Mrs. Jones.

Q. Thank you.

Now, you were the administrator for the Title 3 wiretap, right?

A. That's correct.

Q. Did you have anything to do with the affidavit that led up to getting the wiretap?

A. Yes.

Q. And you're familiar with it, right?

A. I am.

Q. And the affidavit?

MR. GEISE: Objection, your Honor. Can we approach?

THE COURT: Just a few more seconds. Go ahead.

• • • • •

[84]

and D Street Northeast, and that was based on the violent crime. We had crews—

MR. BALAREZO: Your Honor, objection.

THE COURT: I think so. Let's get to this case, because we're getting confused. Sustained.

THE WITNESS: Okay.

BY MS. LIEBER:

Q. Detective Horne, so in the course of the number of years that you investigated criminal activity, alleged criminal activity at 18th and D Street, did you, without getting into the substance of that, of information that you derived from your initial 18th AND D investigation, did that sort of initial investigation trigger a second investigation?

A. Yes.

Q. Okay. And arising out of that, what were the sort – what was the focus of your investigation?

A. Based on intelligence that we received and we learned about Nightclub Levels, a gentlemen, Mr. Antoine Jones, and we learned of his manager and Mr. Maynard, Lawrence Maynard.

Q. And you've been sort of pointing in the direction?

A. Mr. Jones is the light-skinned gentleman next to Mr. Balarezo.

MR. BALAREZO: Your Honor, we'll stipulate.

THE COURT: She's identified the defendant.

Go ahead. What's the next question?

[85]

BY MS. LIEBER:

Q: So did you begin investigating Mr. Jones, Mr. Maynard at Club Levels?

A: Yes.

Q: Okay. Give the jury a sense about when was this that you all—when was it just, first of all?

A: Fall of 2004.

Q. Was it just you or did you have a group of folks?

A. It was a task force, so we had other agents, other detectives working, and officers.

Q. Now, sort of the beginning in the fall of 2004 give the jury the sense of the types of investigative measures you undertook to begin investigating potential criminal activity of Mr. Jones and Mr. Maynard.

A. Initially we would go and conduct our physical surveillance ourselves, which involved sitting in the car, kind of watching the club to see what kind of activity was going on. The club opens and closes at certain times. The people in the cars that were coming and

going. We, after doing that for a while we eventually got a pole camera that we could—

MR. BALAREZO: Your Honor, objection to the extent that Mr. Miles—

THE COURT: Can you use the mic, please?

MR. BALAREZO: Again, I object to the extent that this is testimony not based on personal knowledge.

[86]

THE COURT: Wait a minute. I think she can discuss the techniques, unless she did it herself.

Go ahead. What else besides the pole camera?

THE WITNESS: Physical surveillance, the pole camera. We eventually, as we call them, we did PIN registers on the phones and then the PIN.

BY MS. LIEBER:

Q. I'm sorry, whose telephones did you get PIN registers on?

A. Mr. Jones' and Mr. Maynard's.

Q. I want to go back to the pole camera for a minute. Why would—first of all, what is the pole camera? Let me start there.

A. It's just exactly what it says, it's a camera that's placed on a stationary object. The ideal situation is you have your pole camera in place to watch a location, is that wherever your feed is going back to you're able to maneuver the camera to move in and move out and actually get an idea and get closeups on

people. We didn't have that option. So we had the pole camera focused on the front of the club.

Q. And give the jury a sense of what kind of information you derived from the use of the pole camera in this investigation.

A. Times that the club would actually open and close, comings and goings during the day, you know, the cars that came during the day, we would tag numbers; things like that.

* * * * *

[113]

Q. How long have you worked in the intelligence section?

A. A little over a year now.

Q. I want to direct your attention—well, have you had lots of different assignments during the course of your tenure at the department?

A. I've had a few.

Q. You've had a few? Okay. I want to direct your attention specifically to the Safe Streets Task Force. Did there come a time in your career that you were a member of the Safe Streets Tasks Force with the FBI and other agencies?

A. Yes.

Q. When did you start at Safe Streets?

A. I started around end of '91/beginning of 1992.

Q. And how many years total did you spend working in the Safe Streets Task Force?

A. Somewhere around fourteen.

Q. In the course of your fourteen or so years on the Safe Streets Task Force did you have occasion to participate in a number of criminal investigations?

A. Yes.

Q. Now, I want to direct your attention to one of those criminal investigations during your time with the Safe Streets. Did you participate in the investigation of Antoine Jones and Lawrence Maynard?

A. Yes, ma'am.

[114]

Q. And specifically did you take on—well, first of all, was there a team of agents that you worked with on that case?

A. Yes.

Q. And in the course of your investigation did you take on a particular area of focus of that investigation?

A. One of the roles I took on was like the liaison with our technical people with the FBI's technical people.

Q. With respect to what kind of technology?

A. Video and GPS tracking.

Q. And did you also personally conduct some surveillance and other aspects of the investigation?

A. Yes.

Q. I just want to focus this morning, this afternoon, I'm sorry, on your work with the GPS and your work with the video camera. Okay?

A. Um-hmm.

Q. Now, first of all, why did members of your team think that it would be a good idea to use the GPS device, what kind of movement were you observing, physical surveillance?

A. Physical surveillance is actually hard, you know. There's always chances of getting spotted, you know, the same vehicle always around, so we decided to use GPS technology.

Q. And do you remember the specific that the GPS—well, first of all, what vehicle was the GPS device placed on?

A. The GPS was put on Mr. Jones', I think it's a Grand [115] Cherokee Jeep.

Q. Do you recall the date that the GPS actually went on?

A. September 27, 2005.

Q. And can you tell the jury in terms of the, they've heard some testimony about how the technology works so we won't bore them with that, but tell the jury in this case how you monitored the whereabouts of Mr. Jones' Jeep during the course of the time that the GPS was working on his car.

A. We had the laptop that would—you could monitor it live, or to save on battery energy by not monitoring it live a lot, the unit would always forward the information historically so we can go back and see where

the Jeep has been, or if we needed to see it right then we can pull it up live if it's awakened.

Q. And you talk about both doing retroactive, going back to look and see where the Jeep was versus live. During the course of the period of time that you had the GPS device working on Mr. Jones', or, I'm sorry, on the Jeep, did you do both, did you sometimes monitor it live and sometimes go back and see what was happening?

A. Yes.

Q. Okay. And what kinds of things would cause you to go back and see where the Jeep had been?

A. Like if we reviewed some of the phone calls that were being intercepted and find something we know where the Jeep was at, we'd go back and track it.

[116]

Q. And tell the jury, again, with respect to this particular GPS device that you used in this case, did you have occasion to actually put the GPS data that you were receiving into the map software?

A. Yes. The tech people had that all hooked up. When we were monitoring it live it was going through mapping software.

Q. Okay. So when you were monitoring it live you weren't reading coordinates and doing your best to figure out where this latitude and longitude was?

A. They do have the coordinate at the bottom, but it's actual looking at the screen, it looks like a Mapquest map or an ABC, like the books you buy. It would be

mapped out like that and then we'd have a little icon, and wherever it went it left a little dot.

Q. Okay. Now, we've talked about the GPS data. Did you actually—when all is said and done was the GPS eventually taken off of Mr. Jones' Jeep?

A. Yes.

Q. When did the monitoring of the whereabouts of Mr. Jones' Jeep end?

A. On the morning of the closeout, the 24th of October, 2005. They served a search warrant at the location where the Jeep was, and at that point when they were done they brought the Jeep back and the technical guys removed the equipment that day.

Q. When you say "brought the Jeep back," where did they take [117] the Jeep?

A. They took it to a secret location.

Q. Now, after that happened, when all was said and done with respect to the GPS, did you ever obtain a data file of all the coordinates that were ever picked up from the time that the GPS was working during the course that it was on Mr. Jones' Jeep?

A. The tech guys I think, the GPS techs was on the CD.

Q. And just tell the jury if you were to print out the CD, how many pages of data would come out of a computer if you were to print it out?

A. I would say probably too much to print. I attempted to start printing some and the stack was getting like this (indicating) and it was only a day.

THE COURT: What's "this" for the record?

THE WITNESS: Four inches thick

BY MS. LIEBER:

Q. So did you stop printing at that point?

A. Yes, yes.

Q. Did you have occasion then instead of printing it automatically to actually go back and review all the data that was on that disk to find out where the Jeep had been during the time that it was active on Mr. Jones' Jeep?

A. Yes. What the disk yon're able to bring it out on a computer and not scroll through it from the day that is was on, the whole time that the machine was actually tracking it—

[118]

Q. And now I want to just stop for a minute.

A. —that we've been talking about when the GPS was actually working on Mr. Jones' Jeep.

Q. Did there come a time during the course of that time the actual device was affixed somewhere to that Jeep that the batteries died.

A. Yes, there was.

Q. Tell the jury about that.

A. On October 14th, around three in the afternoon, three p.m.

THE COURT: How do you know that, how do you know it dies, because the coordinates aren't being—

THE WITNESS: The last coordinate, the last information from the device was on October 14th around three p.m.

BY MS. LIEBER:

Q. Did there come a time that you all were able to install a fresh set of batteries on to that Jeep?

A. Yes.

Q. When was that?

A. October 19th, 2005.

Q. So just so the jury knows, between October 14th and October 19th of 2005 when the device wasn't working you have no GPS data for that, there's a black hole?

MR. BALAREZO: Object to the form of various questions.

[119]

THE COURT: You mean leading?

MR. BALAREZO: Leading.

THE COURT: Overruled.

THE WITNESS: I'm sorry?

THE COURT: You don't have any data between the 14th and the 19th.

THE WITNESS: Yes. As soon as we saw there was no data coming, we tried to go live. We knew there was a problem, and it turned out to be the batteries died, and during that time period we have on coordinates for the test.

BY MS. LIEBER:

Q Okay. So there was no backup battery or anything that can give you some information?

A No, not that I know of.

Q Were you actually there when the batteries were changed on the Jeep?

A Yes, I was.

Q Why did it take five days?

A To get the equipment on the Jeep we had to get the Jeep isolated to a place where we knew, for one, we knew where it was going to be, and for two, that people that use it wouldn't, you know, wouldn't be in it, and the best isolation we were able to get through, listen to the phone calls, was that parking lot.

Q Now, let's talk about some of the data that you derived during the course of that intercept or the GPS time frame. In [120] the course of your investigation did you all locate a house that you were interested in?

A Yes

Q What was the address of the house that you were interested in?

A 9508 Potomac Drive.

Q And through the use of the GPS technology were you able to come up with an association between Mr. Jones and that house?

A Yes.

Q And tell the jury about that.

A We, through the GPS, we were able to monitor through the mapping software.

MR. BALAREZO: Your Honor, objection. Can we approach, please?

THE COURT: All right.

(Bench conference on the record as follows):

MR. BALAREZO: Again, object to the way he's testifying. I think he's going to say through the GPS we would be able to track Mr. Jones to the house. I can tell you that there is not one line on that 2000-some pages of the GPS data that says 9508 Potomac Drive. If he wants to say we surveilled him, we saw him going in the house. I don't care. We'll deal with that. But for him to say that the GPS took him to 9805 Potomac Drive, that's not accurate.

THE COURT: The GPS took him in the neighborhood.

* * * * *

[129]

MS. LIEBER: If I may just have a minute.

THE COURT: Sure.

Exhibit 1 is admitted. Making one change, but that's it.

(Government Exhibit No. 1 was admitted into evidence at about 12:42 p.m.)

(Government Exhibit Nos. GPS 2-12 were marked for identification at about 12:42 p.m.)

BY MS. LIEBER:

Q. Detective Kirschner, I'll walk up to show what you I've marked as Government Exhibits GPS 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and see if you recognize these.

A. Yes.

Q. What are those?

A. These are a printed sheet from the computer we use the GPS on. It's like a snapshot of the Wind Track software. This is what it looked like monitoring it either live or historical.

Q. On there do you actually see a couple different things? First of all, do you see some red dots along the map?

A. Yes.

Q. What do those red dots represent?

A. The red dots represent where the Jeep has been.

Q. Is there sort of a route of travel?

A. Yes.

Q. Is there a little icon in green that says "Jeep"?

[130]

A. Yes.

Q. What does that represent?

A. That represents the Jeep that has the bypass.

Q. Tell the jury before we actually put these on the screen, were these actual snapshots printed out directly from that system?

A. Yes.

Q. Okay.

THE COURT: This is what the software produces for you?

THE WITNESS: Yes. This is what the software produces.

THE COURT: Just for our understanding, what are the little red dots all over the place?

THE WITNESS: That's as the Jeep travels when the device sends a GPS coordinate it marks it with a dot on this software.

THE COURT: Does the software release a little thing that says "Jeep," the little green picture?

THE WITNESS: When they program it into the software the tech put the word "Jeep" in there.

THE COURT: But the Jeep, as these pictures show, are in different locations, it just happens to be one location you've highlighted by putting the little Jeep in?

THE WITNESS: Yes. The red dots are where the Jeep is [131]traveling, so in other words, if there's ten dots there and it's on dot number one and the Jeep is there, that's where the Jeep was when I printed this snapshot.

BY MS. LIEBER:

Q. Okay. So just so we're clear, was this icon entry made by the tech before you—at the beginning of setting up the software?

A. Yes, when they set up the software to use for the tracking.

Q. So as of September 27, 2005, if you actually had your laptop or the laptop open and you were tracking in realtime—

MR. BALAREZO: Objection to the form, your Honor.

THE COURT: Overruled.

BY MS. LIEBER:

Q. —what would you see?

A. You would see the green icon that says "Jeep" below it.

Q. So these weren't created as a trial exhibit, the Jeep?

A. No.

Q. And finally, before we actually put those up, based on your review of the GPS data points, can you sit here and testify to this jury that at every time the specific address 9508 Potomac Drive popped up in that mapping software?

A. I don't understand that question.

Q. Okay. That was a bad question.

Nothing on that, on those pictures, does anything on those pictures indicate the actual street address 9508 Potomac [132] Drive?

A. Yes. The actual map has it looks like a street map and it has the name of some of the streets on it.

MR. BALAREZO: Objection; nonresponsive.

THE COURT: Overruled.

BY MS. LIEBER:

Q. Do you actually see Potomac Drive on that map?

A. Yes.

Q. Okay. And I'm showing you Government's Exhibit GPS 1, which is in evidence. It appears when we see arrival at Potomac Drive and departure from Potomac Drive, do you see those entries?

A. Yes.

Q. Can you testify that based on just the data that you reviewed from the GPS, not any other surveillance that you've done, can you actually that it was actually 9508 or just Potomac Drive?

A. Potomac Drive.

Q. And why is that?

A. The tracking device there, I don't think it ever gave out, you know, an exact address, or where everything is. It puts you in the blog. On the software it shows you where it is by coordinates. I'm not too sure of the actual address that popped up.

Q. Okay. So do these photographs that I'm about to seek to [133] move into evidence, do they actually fairly and accurately depict what the tracker showed you?

A. Yes.

Q. Okay.

MS. LIEBER: Your Honor, at this time if I have haven't moved in GPS 2 through 12.

THE COURT: Any objection to 2 through 12?

MR. BALAREZO: No.

THE COURT: All right, they're admitted.

(Government Exhibit Nos. GPS 2 through 12 were admitted into evidence at about 12:47 p.m.)

THE COURT: These are different days and this is what the coordinates showed when they mapped them, right?

THE WITNESS: On these shots, yes.

THE COURT: They're different, they're not all the same day, they're different days?

THE WITNESS: Right.

(Government Exhibit Nos. GPS 2-12 were admitted into evidence at about 12:48 p.m.)

BY MS. LIEBER:

Q. I'm not going to mercifully go through each and everything. Detective Kirschner, I'm not going to go through each and every one of these snapshots with you, but I want to talk to you about one in particular to walk the jury through what we're talking about and then refer to the summary chart. And I'll just take [134] the first one, the first day, GPS No. 2, so everybody has a sense of what we're talking about here, and I'm not sure how good the color—oh, I don't think there's color. First of all, the judge asked you and I asked about you these red dots. Do you see these red dots that I'm indicating?

A. Yes.

Q. Is that the path of travel that you were talking about?

A. Yes, it is.

Q. Now here the green icon that says "Jeep." Do you see that?

A. Yes.

Q. On Potomac Drive?

A. Yes.

Q. And again, it doesn't give an actual address 9508; is that right?

A. That's right.

Q. Now, we talked about the coordinates along the bottom. I'm going to zoom a little bit here if I can. Does this give you a date and a time and the actual coordinates of when this particular snapshot was taken?

A. Yes, it does.

Q. So for instance, Government's GPS 2, what is the date of that?

A. 9/27, 2005.

Q. What's the time?

A. 21:51 hours, which is 9:50 a.m. It's military time.

[135]

Q. And now this whole string of lots and lots of numbers, what are those?

A. That's the latitude.

MS. LIEBER: And, your Honor, just for the record, what I'm pointing to is a banner of data on the very bottom.

THE COURT: We see it.

MS. LIEBER: Left corner.

THE COURT: Okay.

BY MS. LIEBER:

Q. And so how does this data here that I've sort of indicating with a circle, these latitude and longitude, how does that get spit out into where the green Jeep is placed on the map?

A. That's the GPS giving those coordinates through the satellite system.

Q. How does that actually end up in this nice picture that we have?

A. The tracking device forwards that to the computer via cell phone in this case and sends that information there and software puts it in this nice format that we see there.

Q. Okay. Great. Now, and in part did you use these snapshots as data that helped form the chart that we're going to be talking about now?

A. Yes.

Q. So Detective Kirschner, we were talking about September 27. Let's talk about what actually happened that day in terms of the [136] wire interception of the GPS. So here we have 9/27 on the top line. Tell the

jury what happened on September the 27th, 2005 with respect to the Jeep and the phone traffic.

A. At 8:54 p.m. on 9/27/05 we received a call. A call went out to Maynard.

Q. And when you say a call went out, a call from whom?

A. A call from Mr. Jones.

Q. To?

MR. BALAREZO: Objection. Personal knowledge here.

THE COURT: I think he listened to the call, didn't you?

THE WITNESS: Yes.

THE COURT: He listened to it, and it's a call from who was calling out?

THE WITNESS: The phone call from Mr. Jones' phone to a person by the name of Maynard.

BY MS. LIEBER:

Q. What time was that call?

A. That call was at 8:54 p.m.

Q. What did Mr. Jones say to Mr. Maynard?

A. Coming to see you later on.

Q. And so now if we look here in these two columns about the activity at Potomac Drive, where did Mr. Jones go after the 8:54 p.m. call?

A. It shows the Jeep arriving at 9:51 p.m. and departing at

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[141]

Q. And in the course of your review of that video footage did you lift some still photos from the video?

A. Yes, I printed out the photos.

Q. Okay.

THE COURT: Are these photos 41?

COURTROOM DEPUTY: 41, 42, and 43.

THE COURT: I'm sorry. Again?

COURTROOM DEPUTY: 41, 42, and 43.

THE COURT: Are photos?

COURTROOM DEPUTY: Are photos.

BY MS. LIEBER:

Q. Detective Kirschner, I'm going to show you—

THE COURT: Any objection to 41, 42, and 43?

MR. BALAREZO: No, your Honor.

THE COURT: Mr. Lyons?

MR. LYONS: No.

THE COURT: Okay, they're admitted. Fine.

(Government Exhibit Nos. Photo 41-43 were admitted into evidence at about 12:58 p.m)

BY MS. LIEBER:

Q. Government's Exhibit No. 41, Detective, what is this a picture of?

A. This is a picture of the driveway at 9508 Potomac Drive in Ft. Washington.

Q. And what is the date of that photograph?

[142]

A. 10/14/05

Q. And what is the time of that photograph?

A. 8:11 a.m.

Q. How did you use in sort of camera surveillance as a check on the GPS.

A. We were able to identify a property that we thought was being used on.

Q. And you don't have to talk about what you thought was going on there, just you located a particular house?

A. Yes.

Q. What's the address of that house?

A. The 9508 Potomac Drive.

Q. And did you compare the video footage with the GPS data that you were deriving, did you do that comparison?

A. Yes.

Q. So for instance, on 10/14 of 2005 this says 8:11 a.m. What do you see backing up at that house?

A. Jeep Cherokee.

Q. And what is this area here that I'm showing with my pen beneath the Jeep Cherokee that comes out this way?

A. This is a driveway that goes from the street up and then the driveway bends to the left.

Q. And are you personally familiar with the layout of the front and side of that house?

A. That's side, yes.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Nov. 26, 2007
9:30 a.m.

AM SESSION
VOLUME 8
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

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[17]

* * * * *

Q Now, during the period of surveillance, which was from when to when just so we have it clear?

A Surveillance of?

Q The GPS surveillance. Let's say that.

A The GPS tracking?

Q Right.

A It was from September 27th to October 14th.

Q Which is when the battery kind of died?

A The battery died. Then it was from October 19th, 2005 to October 24th.

Q All right. Now, during that entire period from September 27th, 2004 until October 24th, 2004, how many times did you, Detective Kirschner, go out to 9508 Potomac Drive?

MS. LIEBER: Your Honor, it's 2005 just so the record is clear.

MR. BALAREZO: I'm sorry.

[18]

THE COURT: Okay.

BY MR. BALAREZO:

Q The times that the GPS was on, September 27th, 2004 to October 24th, 2004, how many times did you personally go out to conduct what I think is called an eyeball surveillance of that house?

A I didn't go out for eyeball surveillance, but I had to respond there to change videotapes.

Q So the answer to my question is none, right?

A While I'm there, I have an eyeball on the house.

Q How many times did you go to the house, period?

A Probably maybe a half a dozen to a dozen.

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[19]

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Q Now, when—if I could just have one second. Now, unless you personally saw the jeep and you saw Mr. Jones driving, you cannot tell this jury that it was Antoine Jones that was anywhere near that location at any time during the GPS tracker, right?

MS. LIEBER: Objection.

THE COURT: Well, if he can answer the question, go ahead. He's welcome to answer.

THE WITNESS: Yeah.

BY MR. BALAREZO:

Q Okay. Did you personally see Antoine Jones at any point?

A No.

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[33]

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Q Now, you didn't personally read all 2700 or whatever, 2200 pages of the GPS tracking data, did you?

A I skimmed through it looking for certain locations, that's all.

* * * * *

[43] testify if this is standing still, if it is actually moving, because it's just a short window.

THE COURT: I'm confused. Why couldn't it be while that car was—Why couldn't he be driving on that road? I don't find this probative of anything.

MR. BALAREZO: That's my point, Your Honor. Why couldn't Mr. Jones just be driving on the road when they claim he is on Potomac Drive? That's the exact point.

THE COURT: Because he gets to Potomac Drive here. So you can't say when he is on Fort Foote he is on Potomac Drive.

MR. BALAREZO: It's not even worth it. I'll withdraw the exhibit.

THE COURT: Fine. Thirty-one is withdrawn.

(Open Court.)

MR. BALAREZO: Your Honor, I'll just withdraw this exhibit.

BY MR. BALAREZO:

Q Now, you indicated that the GPS tracker konked out on you let's say, on October the 14th, right?

A Yes, sir.

Q And by konked out, basically the battery died?

A Yes, sir.

Q Are you familiar with the mechanism that makes it go out? Like did it have a sleep function, or did it always just turn [44] off, do you know? Are you familiar with that?

A When the battery died?

Q At any point?

A Yes. It has a sleep mode, so when it's sitting and not moving for a while, it goes asleep so it doesn't have a drain on the battery.

Q Can you tell us what was the period that the device had to remain still before it went into the sleep function?

A That, I don't know.

Q Did you ever check the data to see if it was maybe ten minutes, five minutes, an hour?

A I just had the information of when it went to sleep and when it came back on.

Q Now, do you know where the device was at the time that the battery died?

MR. GEISE: Your Honor, If I might just consult briefly with Mr. Balarezo.

(There was a pause in the proceedings.)

BY MR. BALAREZO:

Q Without divulging any secrets as to the exact location of the device on the vehicle, what I'm asking is do you recall where the vehicle was when the battery died?

A I don't recall the location, but I was able to review the text, I could give you the location.

Q Let me ask you this one. Do you recall where the vehicle [45] was at the time—well, strike that.

Did you personally change a battery in the device at some point?

A No, but I was there.

Q You were there? Who changed the battery?

MS. LIEBER: Objection, relevance.

THE COURT: Overruled.

BY MR. BALAREZO:

Q Who changed the battery?

A One of the tech guys.

Q Do you know who?

MS. LIEBER: Objection, the name of the tech guy is not relevant.

MR. BALAREZO: It is, Your Honor, if he changed it.

THE COURT: Changed what?

MR. BALAREZO: The battery.

THE COURT: I don't understand what difference it makes.

MS. LIEBER: Your Honor, if we could approach?

THE COURT: All right.

(Bench conference.)

THE COURT: I don't understand.

MS. LIEBER: They don't want to divulge the names of the people who do this kind of stuff. Those are my instructions. I can't imagine how the name—

[46]

THE COURT: What difference does it make to you?

MR. BALAREZO: Because I am going to cross him now about the changing of the battery. I believe his testimony is, from last time is going to differ a little bit. If there was somebody who actually changed the device, which I may need to call the person as a witness.

THE COURT: I'm waiting to see what you bring out.

(Open Court.)

BY MR. BALAREZO:

Q All right. So you were present at the time that the battery was changed, right?

A Yes.

Q Where was the vehicle at the time that the battery was changed?

A It was parked in the parking lot of Gold's Gym, 3317 Plaza Way in Waldorf.

Q Let me show you what I've marked as Jones Number 32 for identification.

MR. BALAREZO: The Government has no objection to 32 just to save some time.

THE COURT: Thirty-two is admitted.

(Jones Exhibit Number 32 was admitted into evidence.)

BY MR. BALAREZO:

Q Number 32, you recognize this to be another printout of [47] the data, correct?

A Yes, it appears to be.

Q Looking specifically at the highlighted portions, October 14th, 3:08 P.M. the vehicle apparently was somewhere in the vicinity of 9712 Apollo Drive, Lake Arbor, right?

A Right.

Q Does that concur with your recollection of where the vehicle was at the time that the battery died?

A The battery died there according to the text that's on it.

Q And then, on the 19th at about 1:00 in the afternoon, the battery comes back to life on 10998 Buena Vista Court; is that right?

A That's when it kicked on, yes.

Q Now, you said that the—and Buena Vista Court, 10998 Buena Vista Court is an address that's very close in distance to Mr. Jones's address at 10870 Moore Street; is that right?

A It's in his neighborhood.

Q Same neighborhood, so if you were looking at that particular date, you'd say, oh, he's back in his neighborhood. He's probably home, right?

A Either coming or going.

Q Coming or going, all right. Now, the tracker though, when it comes back to life, comes back to life on Buena Vista, right?

[48]

A Yes.

Q Not on, what did you call it, 3317 Plaza Way?

A Right. We observed him driving from there. He went in the direction of his home.

Q Okay. The we, you and whoever else makes up the we, did any of you take a photograph of the jeep at that time?

A No, sir.

Q Did you take a photograph of either of them driving away?

A No.

THE COURT: You're saying you actually saw him get out of Gold's and into to the car?

THE WITNESS: Him and his wife, yes.

THE COURT: Then you saw the jeep drive away from Plaza Way?

THE WITNESS: Plaza Way, yes, Ma'am.

BY MR. BALAREZO:

Q You said he and his wife got out of the car and went into the Gold's?

THE COURT: No, that's not what he said.

BY MR. BALAREZO:

Q You said he and his wife. What did you mean by he and his wife?

A They came out of the Gold's and went into the car.

Q Did you see the vehicle when it arrived?

A No.

[49]

Q So, you followed it via the tracker to the Plaza Way and did you see Mr. Jones get out of the vehicle?

A No, the tracker was dead at the time.

Q Okay. Well, how did you find it? That's all I'm asking.

A I found it, the wire monitoring room picked up a phone call from Mr. Jones saying that he was going to work out.

Q All right. So that's the only way you found it? It wasn't through the tracker that you found it at the Gold's?

A No, I responded to the gym near his house and I observed the vehicle.

Q Now, without specifically telling us what was discussed in that conversation with the wire, the wire

room provided to you, did they indicate specifically that he was going to go to Gold's Gym?

A No.

Q I guess you knew from before that that's where he worked out?

A No, I knew there was a Gold's Gym in that area. I knew he worked out at a gym.

Q You knew he worked out at that Gold's Gym?

A At a gym.

Q Not necessarily that one?

A Not necessarily that one.

Q Now, the Gold's Gym, I mean, it's nearby but it's not in Mr. Jones's neighborhood, correct?

[50]

A It's within just over two miles, I believe.

Q It's about two miles away?

A Maybe a little more.

Q Now, you do remember testifying previously in relation to this case, right?

A Yes.

Q Last year you testified I think October the 6th, right?

A Around that time, yes.

Q And I was asking you questions about where this happened. You were saying it happened at Gold's Gym.

Today, you tell the jury that the gym is about two miles, a little over two miles from the house, right?

A Yes.

Q Do you remember last year you were asked the question, quote, and are you familiar with that area to sufficient—I'm sorry, Page 77, Line 21, November 6, 2006, the morning session.

You were asked, Are you familiar with that area to, and I'm going to read exactly what it says. "Are you familiar with that area to sufficient to know that that is basically the location where Mr. Jones lived?" Answer, "Which is right down the street from Gold's Gym" Question, "From Moore Street though, right? Answer, Yes.

Just a year ago, you were saying that the gym was just down the street from Mr. Jones's address, right, making

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[54]

you, sir?

A No, sir.

MR. LYONS: No other questions.

THE COURT: Okay. Ms. Lieber.

MS. LIEBER: Your Honor, thank you. While I'm rebooting the computer, which will take about 30 seconds, I'm going to pass out the edited timeline.

THE COURT: Yes. We had to make a little, a correction, a minor. So, do you all have your timeline?

Could you pass that in so we'll give you the new one with this—do they all have the exhibit number or what?

MS. LIEBER: That's how we can identify that it's the new one.

THE COURT: I think we'll collect the ones right now, and we'll just destroy those. This is very minor corrections just to get it right.

REDIRECT EXAMINATION

BY MS. LIEBER:

Q Detective Kirshner, good morning, again.

Tell the jury, Mr. Balarezo showed you this whole long list, and I frankly don't recall what, oh, Jones 25, this multi-page document that's in evidence, where you have all these different addresses showing here. So we have these addresses, Detective Kirschner, 9570, 9584, 9622, 9606, all these addresses every ten seconds or so, they shift a little [55] bit. Does this mean that the jeep was physically bouncing down the street, up the street, down the street, up the street every ten seconds?

A No. First of all, during the time we were monitoring it live, we didn't have this text printout. This came afterwards. As you go down Sandy Bar and make a right onto Potomac, where 9508 is, it would be on your right. It's only three houses on the right on that even side of the street. So I don't know where all these different addresses came from.

Q Okay. So, to your knowledge, is there a 9570 and a 9584 and a 9622? Do those actually exist affixed to houses in that block of Potomac Drive?

A I'm not sure which ones there are, but there's only three houses there.

Q And is one of those houses 9508 Potomac Drive.

A The one in the middle is 9508.

Q Okay. And so when you talk about what you were monitoring at the time that this data file was later, when you said that you were monitoring from time to time the movements of the GPS on the jeep in real time, what were you watching?

A We were watching, like I showed the other day, the snapshot.

THE COURT: Is that what she has put on the screen?

THE WITNESS: Yes, what she put on the screen.

THE COURT: What exhibit is that?

[56]

BY MS. LIEBER:

Q Just for the record, I'm showing you just as an example, Government's GPS Number 4? Is this what you were monitoring?

A Yes, it is.

Q So when you're looking at the computer that you have with you to watch the tracker, is it showing you pictures instead of these latitude and longitude?

A It's showing is the map and it's tracking where it goes with the red dots.

Q Okay. So for instance, the pictures here that are in evidence, the GPS series of exhibits, these snapshots, is this what was coming up on your screen?

A Yes, it is.

Q And when we talk about—

THE COURT: How do you explain the discrepancy in numbers so to speak? What's more accurate, what you see on the screen on the diagram or these numbers that are associated with real or unreal addresses?

THE WITNESS: I wish I could answer that. It would probably be Mr. Bitsie who could answer that.

BY MS. LIEBER:

Q Detective Kirschner, just so, we're talking about there are three houses in that half block. I'm indicating here again on GPS Number 4 where the green jeep is sort of in the middle of that piece, that sort of dead end, is that the half [57] a block you're talking about?

A Yes.

Q Okay. So there are three houses up in there?

A Yes.

Q Now, Mr. Balarezo also asked you, you know, you have no, the only thing that you have saying that Mr. Jones was at 9508 Potomac Drive is this GPS. Is that all you know?

A No.

Q Tell the jury what else you know about what puts Mr. Jones at 9508 Potomac Drive?

MR. BALAREZO: Objection.

THE COURT: Overruled.

THE WITNESS: Well, first of all, we have the GPS as you can see on the snapshot going into that block. We have phone calls leading up to him going there. And we have Mr. Bermea, who was the subject that was inside the house identified Mr. Jones as being there.

BY MS. LIEBER:

Q When you say identified Mr. Jones as being there, have you personally talked to Mr. Bermea about Mr. Jones?

A Yes.

Q What did Mr. Bermea in summary tell you about whether or not Mr. Jones came to 9508—

MR. BALAREZO: Objection.

MR. LYONS: Objection, Your Honor.

* * * * *

[59]

Drive on the 14th, and looking at this summary exhibit, it gets there at 7:03 A.M. The tracker goes to sleep at 8:02 A.M. And it kicks on again. It wakes up at Oxon Hill Road, which is about two miles up; is that right?

A Yes.

Q So, in that approximate hour plus a few minutes, does the GPS, the data in this sort of printout form that

Mr. Balarezo showed you, that data printout form showed the jeep sort of bouncing around a little bit?

A Once the Jeep turns towards the garage and out of view for a time, I never see it cone back out of view.

Q Okay. That's my question. So, the first piece of that question is, does the data, all these every ten second coordinates show that it's sort of bouncing around a little hill?

A As you can see from the photo Mr. Balarezo showed me earlier of the house, a lot of trees in the area, and the GPS is picked up better when it's moving than when it stops, and it changes satellites, you can't—trees affect it. And there were plenty of trees in that area.

Q Now, you're talking about Jones 28 that I put back up on the screen for you?

A Yes. So you actually can't even see the driveway on the right through those trees.

Q Now, let's talk about this picture. Mr. Balarezo asked [60] you about all we have is your word that this is actually 9508, that this being Government Photo 41, for example?

A Yes.

Q It's a picture of the same house as the aerial?

A Yes.

Q You see a lot of trees here, is that right, on Jones 28?

A Yes.

Q Do you see some trees here?

A Yes.

Q Is that the same house?

A Yes.

Q Now, and I just want to talk to you a little bit, aside from the GPS when you used it to help identify potential visits to Potomac Drive by the jeep, did you also, in the course of your review of the GPS tracking data, help identify visits of the jeep to other locations of interest to you in your investigation?

A Yes, we did.

Q Okay. And did you, when you were trying to figure out what the GPS might tell you, listen to some telephone calls in conjunction with your review of the GPS data and try to match some of that information up?

A Yes, we did.

Q So, for example, I'm going to play for you Call 273—

MR. BALAREZO: Objection, beyond the scope.

[61]

THE COURT: Overruled, goes to the accuracy of the GPS.

BY MS. LIEBER:

Q If everyone wants to turn on your new timeline to September the 28th which is Page 22. If you see on Page 22, Det. Kirschner, I'll put mine up on the screen for you. As you see, this is September 28th. This is Government's Miscellaneous 1, the timeline?

A Yes.

Q September 28, 2005, and I'm going to be talking to you about a particular entry here at 7:28 P.M. Okay. I'm going to play that call right now. It's Call 2737.

(Call number 2737 is played.)

BY MS. LIEBER:

Q Now, Det. Kirschner, in the course of your investigation, do you come to learn where Michael Huggins lives?

A Yes.

Q What street does he live on?

A Barto Avenue.

Q Do you remember what town that's in?

A I believe Suitland.

Q Now, in conjunction with that call where Mr. Jones said he's on his way to Mike's house, I'm going to show you what's been marked for identification only last week as GPS 13, and I want you to review whether or not shortly after that 7:27 P.M. [62] phone call, Mr. Jones actually does go to Barto Avenue in Suitland, Maryland?

A Yes.

Q What time does he arrive at Barto Avenue in Suitland, Maryland?

A 20:11 hours, which is 8:11 P.M.

Q And is that just one example of other occasions that you can use to compare to the accuracy of the GPS with the help of the phone calls?

A Yes.

Q Finally, Det. Kirschner, this whole business about the replacement of the battery—

MR. BALAREZO: Objection, Your Honor, to this business.

THE COURT: Agree. She'll get there.

BY MS. LIEBER:

Q I apologize. The last series of questions by Mr. Balarezo about the replacement of the battery on October the 19th of 2005?

A Yes.

Q Were you there when the batteries were replaced?

A Yes, I was.

Q And about what time were the batteries replaced on that jeep?

A Shortly before noon.

[63]

Q And how do you know that?

A Because that's when we finished and pulled out of the, pulled into the other area of the parking lot.

Q And were you concerned about whether or not your detectives would be spotted replacing batteries?

A Yes, there was actually a window at Gold's Gym that overlooked the parking lot. We were worried.

Q Did you have any way of knowing for certain that Mr. Jones was inside the gym?

A Yes.

Q How did you know that?

A I called back to the monitoring rooms, the wire, to see if there were any phone calls intercepted and there were.

MR BALAREZO: Objection to the hearsay.

THE COURT: Something offered for the truth. It was how did he know that he was there? Go ahead.

THE WITNESS: And they told me he had taken some phone calls.

BY MS. LIEBER:

Q Okay. Now, as Mr. Balarezo's exhibit shows, it's actually Jones Number 32, it appears that the first data entry after—the first data entry is at, on the 19th, like we've been talking about, at 12:58 P.M.?

A Yes.

Q Tell the jury, were you actually watching the tracking device to see if it was working yet?

A Yes.

Q Just tell the jury very briefly how that happened, that the batteries kicked on again as you were watching?

A We obviously were worried about being burned there. So we stayed. It took them over an hour before they

actually came out. We watched them pull past us and go down a side road. And it hadn't kicked on yet. A short time later, it did kick on and it was working.

Q Okay. So within how many minutes of when they actually got in the vehicle and started driving it did the batteries start working?

A About four or five minutes.

MS. LIEBER: Court's indulgence.

THE COURT: Anything further?

RECROSS EXAMINATION

BY MR. BALAREZO:

Q Ms. Lieber just asked you questions about what other information you had that Mr. Jones visited that house. At no point in any call did he say I'm coming to 9508 Potomac Drive, did he?

A When he was in the gym?

Q No, phone calls, the wiretaps?

A Oh, the wiretaps?

Q Yes.

[66]

A No.

Q And at no point does anyone that Mr. Jones is purportedly talking to say come on over to 9508 Potomac Drive, do they?

A I don't believe so.

Q And does Mr. Berma, the one that you said told you that Mr. Jones was at the house, that's the same Mr. Berma that was in the house when a lot of drugs were seized, right?

A Yes, sir.

Q And that's the same Mr. Berma that had a deal with the Government, right?

MS. LIEBER: Objection.

THE COURT: He will be here to testify. Sustained.

MR. BALAREZO: That's all, Your Honor. Thank you.

THE COURT: Thank you, you may step down.

(Witness excused.)

THE COURT: How long is your next witness? I know you need another break.

MR. GEISE: I'd say 30, 40 minutes, Your Honor.

THE COURT: Well, I think everybody needs a little break. So, ladies and gentlemen, we'll take a ten-minute recess.

(Jury Out.)

THE COURT: Mr. Balarezo, for purposes, I think, out of an abundance of caution and fairness, I would like you to, without specifics of who you would like to call or not call, [66] since it's a Government witness you want to call in your case and explain it, the Government's going to have an opportunity to respond to it. I'm not deciding legal issues ex parte when I don't have to.

So I would like to, unless you can give me some reason not, to inform them that not who you plan to call specifically but how you plan to go about doing it so that they can respond. This is complicated issues of evidence that the Court intends to get the thinking of both sides on.

MR. BALAREZO: I guess you would have to, Your Honor.

THE COURT: Briefly, Mr. Geise and Ms. Lieber, the defense would like to call in their case, Detective Yanta. And I am reading between the lines they intend to. I don't know how much they have specific to her other than to bring forth the affidavits and what was wrong or correct or overstated or et cetera, and conceivably to bring on a witness or two to contradict the affidavit.

So, I need you to address that in writing. These are Rules of Evidence. I don't know whether you were worrying about collateral extrinsic evidence, whether we're worrying about whether she should be able -- I think it's fair to say that the purpose to bring her on for is to show that the affidavits were either wrong, exaggerated or stretched, similar to what went on before. And in the event that, if

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[72]

unit that Detective Horne was assigned to at the time?

A Yes, it is.

Q Now, in the course of your career, roughly how many drug search warrants have you been involved with?

A In excess of 500.

Q I'm going to ask you to turn your attention to October 24th, almost a little more than two years ago. That's October 24th of 2005, and were you on duty that day?

A Yes, I was.

Q What was your assignment that day?

A I was a team leader for a search warrant.

Q Now, you say you were a team leader for a search warrant. What does a team leader do?

A A team leader is in charge of a team of agents or officers. When we execute a search warrant, I assign them tasks to do with the search warrant. When I'm a team leader, I always take the job of seizing evidence. That's what I did in this instance.

Q Now you say seizing evidence. What do you do when you're the seizing agent?

A Anything that's seized is evidence. Anything that we determine is, might be fruits of a crime or contraband, it will be seized by us. I'll do all the proper paperwork and make sure it gets into evidence properly.

Q Do you keep track of where it was from?

[73]

A Yes.

Q Now, how many people approximately were part of this particular team?

A There was eight people that assisted on the actual search of the residence, but we had the FBI SWAT team actually begin the entrance. So, once the entrance, the residence was secured, the SWAT team was free to leave, and I had eight people including, nine including myself, to do the search.

Q They were from various police agencies?

A That's correct.

Q Now, did you do a report in conjunction with this?

A Yes. I did the F.D. 302, which is the FBI form, basically an incident report of what occurred that day.

MR. GEISE: Your Honor, if I might approach the witness so he can have a copy of the report to reference if necessary.

THE COURT: Is this document marked?

MR GEISE: We can mark it as Miscellaneous—

THE COURT: This is just for identification?

MR. GEISE: Yes, Miscellaneous 14 simply for identification.

BY MR. GEISE:

Q Now, sir, what was the location that you were responsible for searching that day?

A The residence was 9508 Potomac Drive. That's in Fort

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[82]

fit into an evidence bag. We'll do a tag as you see here. That indicated where it was seized, by whom, the location of the search warrant, the case number, the date and my name because I seized it, including the individual who found it.

MR. BALAREZO: Could I consult with Mr. Geise for one second, Your Honor?

(There was a pause in the proceedings.)

MR. GEISE: If we might approach briefly.

(Bench conference.)

MR. BALAREZO: Your Honor, this is not a big deal. The only other time I saw these physical items were last trial. I'm not going to look at them right now. What I brought up to Mr. Geise before items go back to the jury, I just want to look at them to be sure there is nothing on the tags that might be—

THE COURT: Fine. You all will all look at everything that goes back to the jury room when it becomes time.

MR. BALAREZO: Thank you.

(Open Court.)

THE COURT: Okay.

BY MR. GEISE:

Q You mentioned that that's a heat sealer. What's it used to heat seal?

A It can be used to heat seal anything.

[83]

MR. BALAREZO: Objection.

THE COURT: Overruled.

THE WITNESS: Use it for food, but in this instance, the reason of its importance is a lot of money and contraband drugs was heat sealed. So that's why we seized it.

BY MR. GEISE:

Q Now, you mentioned you heat seal a plastic bag, correct?

A Right.

Q You can put a lot of things in the bag?

A That's correct.

Q Showing you what's been marked for identification as Government's Exhibit 9508-SW-18, would you please tell us what that is and where it was found?

THE COURT: This is also in evidence?

MR. GEISE: Not yet, Your Honor.

THE COURT: Any objection? This is 18?

MR. GEISE: Yes, Your Honor.

THE COURT: He's taking them out, so if you have an objection, I need to know about it before it comes out of the box. Go ahead, 18 is in.

(Government Exhibit Number 9508-SW-18 was admitted into evidence.)

BY MR. GEISE:

Q Now, where was 9508-SW-18 found?

A It was located in Room A also, out of the kitchen. This

* * * * *

[112]

MR. BALAREZO: No objection, Your Honor.

THE COURT: Five, 6 and 7 are admitted.

(Government Exhibit Number 9508-SW-5, 9508-SW-6, and 9508-SW-7 were admitted into evidence.)

THE COURT: The three people that were present were Carrillo-Montelongo, Ricardo Sanchez Gonzalez and the third was Mr. Bermea. I don't know any other names.

THE WITNESS: That's correct, Your Honor.

BY MR. GEISE:

Q Showing you 9508-SW-9 and 9508-SW-8. What are those?

MR. BALAREZO: No objection, Your Honor.

THE WITNESS: We got two cell phones that were located in Room G, as in George.

BY MR. GEISE:

Q With all these cell phones, are there a couple of other sheets that were done by another agent?

A. That is correct.

THE COURT: Eight, nine, no objection, admitted. Those are cell phones I take it in Room G.

(Government Exhibit Numbers 9508-SW-8 and 9508-SW-9 were admitted into evidence.)

BY MR. GEISE:

Q 9508-SW-10 and 9508-SW-11.

THE COURT: More cell phones. Any objection to those?

[113]

MR. BALAREZO: None whatsoever, Judge.

BY MR. GEISE:

Q Where were those located?

A They were located in Room H, as in Henry.

THE COURT: Okay. Those two cell phones, 10 and 11, are in.

(Government Exhibit Numbers 9508-SW-10 and 9508-SW-11 were admitted into evidence.)

BY MR. GEISE:

Q Showing you 9508-SW-23.

THE COURT: Any objection?

MR. BALAREZO: No, Your Honor.

THE COURT: Okay. Thank you. That's admitted, 23.

(Government Exhibit Number 9508-SW-23 was admitted into evidence.)

THE COURT: What's that, sir?

THE WITNESS: This is a money counter that was located in Room E, as in Edward, the closet.

BY MR. GEISE:

Q Let me show you what, 9508-SW-36. What's 9508-SW-36?

A A Timberland shoe box that was located in the attic of the residence. This box contained $94,510 in U.S. currency.

THE COURT: What's in it now?

THE WITNESS: It's empty, Your Honor.

THE COURT: Any objection to an empty box?

[114]

MR. BALAREZO: No, Your Honor.

THE COURT: Box 36 will be admitted.

(Government Exhibit Number 9508-SW-36 was admitted into evidence.)

BY MR. GEISE:

Q Now where was that box found, sir?

A In the attic.

Q Show you what's been marked as Government's Exhibit Number 9508-SW-43 for identification. What's 9508-SW-43?

A That's the box the day of the search warrant photographed prior to opening.

Q Does that fairly and accurately represent the way it appeared at the time?

A Yes.

MR. GEISE: Your Honor, I move the admission of Government's Exhibit 9508-SW-43.

MR. BALAREZO: No objection.

THE COURT: Admitted. Let's show it to the jury please.

(Government Exhibit Number 9508-SW-43 was admitted into evidence.)

BY MR. GEISE:

Q And you say how much money was found in that?

A $94,510 in U.S. currency.

Q You were actually there when that money was counted at [115] the bank?

A At the bank and at the residence.

Q You all actually counted it there?

A Yes. We used the money counter you just saw.

Q The actual money counter that was there?

A Yes.

Q Let me show you now for identification 9508-SW-44. What's 9508-SW-44?

MR BALAREZO: No objection, Your Honor.

THE WITNESS: That's the same box just with a lid open.

MR. GEISE: Move the admission of.

THE COURT: If you can just wait, if there is no objection, don't put it on the screen. That will move it along. There is no objection. This is a picture of what was found in the box. No objection?

MR. BALAREZO: No, Your Honor.

THE COURT: Thank you. Fourty-four is in.

(Government Exhibit Number 9508-SW-44 was admitted into evidence.)

BY MR. GEISE:

Q Now, how was that currency packaged if at all?

A It was wrapped in bundles.

Q Detective Webb, you talked about the box of money found in the attic. Was there other monies found in that attic as [116] well?

A Yes, there was a black, large duffle bag or, you know, gym bag with the large amount of currency in it.

Q Let me show you Government's Exhibit Number 53.

MR. BALAREZO: No objection, Your Honor.

THE COURT: All right. Fifty-three will be admitted.

(Government Exhibit Number 9508-SW-53 was admitted into evidence.)

BY MR. GEISE:

Q What's Government's Number 53?

A That's the large duffle bag that carried the large amount of currency.

Q Now, you said a large amount of currency. Were you present when that currency was processed?

A Yes, I was.

Q How much money was in that duffle bag?

A $750,010

Q Seven five zero comma zero one zero?

A Yes.

Q A little over $750,000?

A Yes.

Q Now, just so everyone knows, the $96,000, or the $94,000, and the $700,000 approximately have all been put in the bank, correct?

A That is correct.

Q Now, how was the money in that duffle bag packaged?

A That's the interesting thing. They were all broken into denominations and then they were vacuum packed and heat sealed.

Q Showing you Government's Exhibit Number 55.

MR. GEISE: I believe without objection, Your Honor.

MR. BALAREZO: What number?

THE COURT: Fifty-five.

MR. GEISE: 9508-SW-55. Actually let's start with 9508—

THE COURT: Fifty-four? No objection.

MR. GEISE: 9508-SW-54.

MR BALAREZO: No objection.

(Government Exhibit Number 9508-SW-54 was admitted into evidence.)

BY MR. GEISE:

Q What's SW-54?

A That's the same duffle bag. Ladies and gentlemen, you can see the packs of money are broken down in denominations. To the left is the $20 vacuum pack bags and to the right is the $50 vacuum pack bags. It's quite a bit of money.

Q And Government's Exhibit 9508-SW-55?

THE COURT: Any objection?

MR. BALAREZO: None.

[118]

THE COURT: Okay. Thank you. That's the contents of the duffle. It's admitted, 55.

(Government Exhibit Number 9508-SW-55 was admitted into evidence.)

MR. GEISE: I think I've got a few more photos, Your Honor. The other witness does the other round.

THE COURT: All right.

BY MR. GEISE:

Q Now, was there also a quantity of drugs found in that attic, sir?

A Yes.

Q Was that actually processed by your partner?

A Yes, Detective Giannakoulias. I seized it. He field tested it.

Q And he'll testify in a little bit about that?

A Yes. It's 97 kilos.

Q Of cocaine?

A Yes.

Q And some cocaine base as well?

MR. BALAREZO: Objection to leading to the discussion.

THE COURT: I think that's right. If he wasn't the person, then we'll have to wait for the next guy.

BY MR. GEISE:

Q You were actually the seizing agent for it?

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386
UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL, DEFENDANTS

Nov. 30, 2007
1:55 p.m.
Day 12

PM SESSION
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

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202-616-9156

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400 Fifth Street, NW, Suite 500
Washington, D.C. 20001

[29] * * * * *

A He was one of the gentlemen that Mr. Jones talked with and met along Branch Avenue on various days.

Q In the course of the execution of the search warrant at his residence did you find any drug paraphernalia that you asserted that you might find at co-conspirator's residence?

A Yes.

Q Specifically, what did you find at Kirk Carter's residence?

A I believe it was three or four scales, I think a strainer had a cocaine residue, tested positive for cocaine residue, ammunition, phone bill for that phone that was utilized and intercepted on the wire.

Q When you say a strainer, what is a strainer?

A It's like we use for spaghetti.

Q How is it—are you familiar with how strainers are used, you mentioned drug paraphernalia in your affidavit that we discussed. How is it that strainers are used in cocaine trafficking?

A Part of the process of trying to break it down. Depending on what you're going to when you let's say break it down. Let me see, the correct word would be

probably when you're mixing your cutting agents and things and you I guess shake it out and—

Q Strike that. Let me ask it this way.

Have you yourself ever manufactured cocaine?

* * * * *

[113]

camera?

A Just digital camera.

Q Were any photographs taken and how were they taken?

A Well, they were taken at obviously, you're in a vehicle, they're taken through the tinted windows and then that's basically it. There's no controlling of light or anything along those lines. You're kind of dealing with the environment that you have whether it be the lighting from the whatever or whatever.

Q Along 9:30 that morning did you make any observations from where you were parked?

A Yes.

Q Would you tell us what you saw?

A We were sitting at the corner. We were actually on Montezuma with the back end of the van facing across Sandy Bar, and then there's a stop sign. So as Mr. Jones' car rounded the corner—

Q You say Mr. Jones' car, what did you see?

A A gold Jeep Cherokee with the license plate that I was familiar with.

Q How were you familiar with that license plate?

A I had been on other surveillances which we followed that vehicle.

Q It is the same vehicle you described a couple of days ago where you were watching the GPS put on?

[114]

A Yes.

Q Please proceed?

A As the vehicles rounded the corner, I told the photographer that that's the vehicle and, you know, she proceeded to take a couple of pictures, went down kind of down a hill.

Q Were you able to see who was driving the vehicle?

A Yes.

Q Who was driving the vehicle?

A Mr. Jones.

Q I don't know if your prior testimony—for the record, I'm not sure if I asked you—do you see the person you described as Mr. Jones in the courtroom today?

A Yes, I do.

THE COURT: I think that's undisputed.

MR. GEISE: For the record, Your Honor, the defendant Antoine Jones.

Q. Now had you seen the defendant before in prior surveillances?

A Yes.

Q And was that, was there anyone else in the vehicle when you saw it coming this way?

A No.

Q What happened then?

[115]

A The vehicle went wherever it proceeded to as it wen down to Potomac Drive.

Q Did you actually see exactly where it went?

A No.

Q But what direction was it going?

A It was headed, I guess that's essentially west down Sandy Bar, down I believe that's Montezuma to Potomac. Potomac runs along the river, but there's no way out on Potomac.

Q Did you continue your observation?

A Yes.

Q What did you see next?

A Not very long later essentially probably enough time to get down to the bottom of the hill and come back up, Mr. Jones' vehicle was coming up to the stop sign.

Now he's basically coming toward us. And he makes a left onto Sandy Bar, and kind of goes around the corner and leaves the area.

Q Were you able to see him?

A Yes. Actually, on that occasion when he came up the hill I was not able to see him.

Q Were you able to see someone else?

A I was able to see that there was a male passenger in the vehicle with glasses, a hat, white T-shirt, and that was pretty much it.

Q Were you able to make out that person's face?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Dec. 4, 2007
9:30 a.m.

AM SESSION
VOLUME 14
TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

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* * * * *

[14]

THE COURT: Overruled.

BY MS. LIEBER:

Q Now, Detective Horne, turning back to the calls, we saw some of these entries on this timeline for September the 7th, 2005. Tell the jury, in the course of your interception, did certain items—without telling us what you thought any term in particular meant, were there certain terms that you all began to focus on, calls that contained these words or phrases.

A Yes.

Q Okay. Tell the jury what some of those words or phrases were?

A Ticket, small ticket, half ticket, VIP ticket, just went along those lines.

Q Okay. And I'll now direct everyone back to the transcript book. And we'll start behind Tab Number 3, where it says Tickets Called, the Bates Page Number on the bottom is Page 68. And we will run through the calls in order throughout that section.

And the first call, September 6th of 2005, 2:08P.M., an outgoing call to Pauline Spence, Call 739. And, Detective, before we hear this call, I just

want to direct your attention to Levels Search Warrant Exhibit Number 16, which is in evidence.

Detective, I just want to direct your attention

* * * * *

[16]

Q Is that the same number as we have here for this call?

A Yes.

(Call 109 was played.)

BY MS. LIEBER:

Q Then, Detective, the next day, call 210, back with John Adams, 4:50 P.M.

(Call 210 was played.)

BY MS. LIEBER:

Q Okay. Now, Detective, September 18th 8:19 P.M., Call 1197, incoming from Michael Huggins, which is at Page 73.

(Call 1197 was played.)

BY MS. LIEBER:

Q Okay. Then, Detective, later, Call 2442, again with Mr. Huggins on September 26th at 11:21 in the evening, Page 74.

(Call 2442 was played.)

BY MS. LIEBER:

Q Okay. Detective Horne, now I'll play the next two calls one after the other 3665 and 3667, both on Octo-

ber 5th at 11:10 and then 11:11 A.M. with Michael Huggins.

(Calls 3665 and 3667 were played.)

BY MS. LIEBER:

Q Now, this next call, Detective, turn the page, you've already heard this call so I'll just reference the last few lines. If you want to start with the fourth line from the bottom, this is Call 4735 on October 13th with Roel Bermea,

* * * * *

[26]

A Okay. At 7:24, Mr. Jones talks to Mr. Johnson who says he's waiting on a few phone calls and will call Mr. Jones back. At 8:43, Mr. Jones calls John Adams, asks if anything is happening. Jones says that he needs to get these people to go so they can come back.

At 8:47, Mr. Jones calls Mike Huggins and asks if anything is happening, frustrated. Dam these people going to be mad at me. I told them I'd be doing all right for them so they could go. At 8:48, calls Mr. Johnson, asks him for some good news to give these people.

At 8:54, Mr. Jones calls Carlos Reyna and says he will see him later on. Reyna says, okay, I have more work for you. At 8:57, Mr. Jones asks Adams if he's working on anything. Adams says his man Ron is going get his ticket tomorrow. Jones says he has to run around there because he didn't keep his word.

At 9:25, calls Pauline Spence and asks her if anything is happening. He's trying to get these people to go. At 9:51, the GPS has his jeep arriving at Potomac Drive. It remains until 10:31.

Q Now, we turn to the next page, September 28th. And, again, I'm not going to ask you to go through each of these entries. But does the pattern, these similar calls that are similar in nature continue again throughout the next day, September the 28th of 2005, with some of these same [27] individuals?

A Yes.

Q Okay. Who else, without reading all the entries, who else received these same kinds of phone calls from Mr. Jones on September the 28th?

A Mr. Jackson, Mr. Holland, Huggins, Adams, Ms. Spence, Kirk Carter and Mr. Johnson.

Q And again, looking at the timeline, does the timeline indicate, if you flip to Page 23, the following page, that after the series of similar calls, Mr. Jones's jeep arrives at 9:35 that evening for about 40 minutes at Potomac Drive?

A Yes.

Q Now, Detective Horne, we also, you noted in this pattern of calls that Branch Avenue still remained—

A Yes.

Q Was still remained the focus and Sam's Car Wash?

A Yes.

Q Okay. At some point, a few weeks into the wiretap portion of your investigation, did you all make the decision that it was time to try to get out and start surveilling some of these meetings that you were hearing about on the wire?

A Yes.

Q Okay. And I want to direct your attention, and I'll just play the call. We don't need to flip back to the page, but to Call 634. It's on September the 15th, with Kirk Carter at

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL, DEFENDANTS

Dec. 5, 2007
2:00 p.m.
Day 15

PM SESSION
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

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* * * * *

[93]

THE COURT: All right. Detective Horne, you're still under oath.

THE WITNESS: Yes, ma'am.

THE COURT: I don't think we need to ask what the detective does. I think we've heard about that. Okay. Go ahead.

MS. LIEBER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. LIEBER:

Q. Detective Horne, welcome back.

A. Thank you.

Q. I honestly don't remember where we left off, but let's start with a new topic.

When you were here, I guess it was yesterday or the day before, you were talking about during the course of your ongoing investigation, how you and members of your team began to notice patterns of call activities on your wire; is that right?

A. That's right.

Q. In the course of that, at some point, a GPS was up and running on the jeep that Antoine Jones drove; is that right?

A. Right.

Q. I want to now direct everyone's attention, and you as well, to the time line starting on October the 8th. And, Detective, I'm getting you a copy. This will be starting on [94] page 29.

Detective Horne, I want to direct your attention specifically to the October 8th and the days that followed, and talk about other terms of interest that developed in the course of this sort of, I guess fifth or so week of the wire intercept, all right?

A. Okay.

Q. We actually heard the calls that you see there at 1:43 and 1:55 in the morning, so I want to start with the 11:25 in the morning entry. If you will talk through with the jury what took place on October the 8th of 2005?

A. Did you want me to read?

Q. Yes, please.

A. 11:25 a.m., Mr. Jones calls Roel Bermea, and Bermea informs him that something has been delayed. At

12:26, the jeep is at Potomac Drive, by the GPS, through 12:37 p.m. At 12:44, Mr. Jones calls unknown person and says the rain delayed party, that it will probably happen tomorrow.

Q. Let me stop you there for a minute. The entry here is for an unknown person. And you talk a little bit about this, but were there folks who Mr. Jones spoke with on the wire that you and your team were just never able to get a positive identification of?

A. Yes.

Q. Is this one of those people?

[95]

A. Yes.

Q. Then two minutes later, who does Mr. Jones call?

A. At 12:46, Mr. Jones calls Kevin Holland, and says that he talked to his uncle and the rain delayed the party.

At 6:06 p.m., Mr. Jones discusses with Lawrence Maynard the financial problems the club was having, and how they can't make their payroll obligations. At 7:38 p.m., Mr. Jones tells Mike Huggins that they cancelled out for the day.

Q. Then if we all turn the page to the next day, October 9th, what is the relevant entry on October the 9th?

A. At 11:14 a.m., Mr. Jones calls Roel Bermea, and he tells Mr. Jones that he'll call as soon as it arrives.

Q. Then the following day, Monday, October the 10th, does he talk to Mr. Bermea again?

A. Yes, at 9:34 p.m.

Q. What does Mr. Bermea tell him?

A. Tells him that my friend, he should be getting here in about four hours.

Q. Now, that's late in the evening, 9:34 p.m., on October the 10th.

If you turn the page to the next day, October the 11th, does Mr. Jones speak with Mr. Bermea first thing in the morning?

A. Yes, he does.

Q. What happens?

A. Mr. Jones calls Roel Bermea and tells him, I got it here [96] already.

Q. Now, I want to talk to you about the next series of phone calls. What is, what is—what do you notice about the timing here in the next several phone calls?

A. It's kind of like what we had said before, that once the call was made to who we believe were the suppliers, then the calls were made to the same gentlemen, Mr. Jackson, Mr. Adams, Mr. Huggins, Mr. Holland, Mr. Johnson.

Q. And they're all one after the other?

A. Correct.

Q. And again, just throughout the day on October the 11th, what does Mr. Jones—what is the nature of the conversation and the timing of the conversation that Mr. Jones is having throughout the day on October

the 11th, after he's talked to Mr. Bermea at Potomac Drive?

A. The tone, intitially, it's for everybody to call him back.

Q. Then at 8:43, let's talk with the jury about what happens at 8:43 that morning.

A. Mr. Jones calls Mr. Bermea and says that he'll be there in about 20 minutes, and the GPS has the jeep at Potomac Drive at around 9:13.

Q. Okay.

A. Until 11:39.

Q. Then again, if you look at the next few phone calls after the jeep departs from Potomac Drive, who is he calling and what

* * * * *

[104]

A. Probably a heavy day.

Q. If you will, I want to talk through with you everything that happened on October the 14th of 2005, based on the wire interception and the GPS.

A. Okay.

Q. So starting first thing in the morning, 6:19, who does Mr. Jones call?

A. Mr. Jones calls Roel Bermea, and as it says, no audio recorded.

Q. Shortly after that, where does the jeep go?

A. The jeep is Steed Road until 6:50 a.m.

Q. From there, where does the jeep go?

A. 7:03, jeep to Potomac Drive until approximately 8:15 a.m.

Q. 8:16 a.m., as the jeep was leaving Potomac Drive, who does Mr. Jones call?

A. Mr. Jones calls Kirk Carter and leaves a message to give Jones a call. At 8:17, Mr. Jones calls Kevin Holland and they agree to meet at the circle by Branch Ave. At 8:19, Mr. Jones calls Demetrius Johnson and they agree to meet at the circle by Branch Ave. At 8:21, Mr. Jones calls Mike Huggins at work and tells him to tell his wife that Jones is on his way over.

At 8:43 a.m., the jeep to Steed Road for 26 minutes. At 9:21 a.m., the jeep to John Adams' house. At 9:25 a.m., Donald Hunter calls and says he needs to see Jones. At 9:35, Mr. Jones calls Carter from John's house and tells him whenever

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386
UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL, DEFENDANTS

Dec. 6, 2007
1:55 p.m.
Day 16

PM SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE, and a jury

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* * * * *

[68]

A. No.

Q. Were you given an assignment by the team leader to search a particular location within this residence?

A. Yes.

Q. What was the location that was your area of primary focus?

A. The garage.

Q. When you say the garage, I'm going to point here to this garage with two doors. Is this the garage we're talking about?

A. Yes.

Q. I'm going to show you a series of photographs taken within the garage?

A. Okay.

Q. Just generally what, was there a particular vehicle that you focused on in that garage?

A. Yes.

Q. What was that vehicle?

A. It was a gold colored Cherokee Jeep.

Q. Why was it that you were focusing on that vehicle in particular?

A. That vehicle during the investigation overhearing the case agents listening and monitoring on the wire, that was the vehicle that the, Mr. Jones was driving most of the time that I remember.

Q. Now sir, I'm going to show you a series of photographs. Before we get to the specifics of each of those photographs. [69] Was anything of note recovered from Mr. Jones' jeep?

A. Yes.

Q. What was the primary item of note that was seized from the jeep?

A. Money.

Q. How much money?

A. I believe it was $69,115.

Q. I'm going to show you a series of photographs, sir, and let's just talk about each of those photos?

A. Sure.

Q. What is depicted here in Government's Exhibit AJSW-12?

A. The rear half of a silver vehicle. The rear half of a silver vehicle and the gold front half of the gold Cherokee that I searched.

Q. Detective, were these vehicles positioned exactly as you see them here when you made entry into that garage?

A. Yes.

Q. Now showing you Government's AJSW-13. Do you see this picture?

A. Yes.

Q. What is this a picture of?

A. That's a picture through the rear compartment, you know, the tailgate portion of the jeep, the back area. The tan thing there is the cover that you can—yes, that you can roll back and cover things in there.

[70]

Q. When you say the tan thing?

A. That's it. It's like a blind type deal.

Q. Just for the record, I'm pointing to this tan colored horizontal item across basically the center of the vehicle?

A. Goes from side to side, you just pull it back.

Q. Detective Sopata, I'm going to direct your attention to a few items in this photograph, and then we'll talk some more about those?

A. Okay.

Q. Do you see this black computer bag here?

A. Yes.

Q. Sort of the upper third part of the picture?

A. Yes.

Q. Then this blue, sort of royal blue colored item down here on the left hand side?

A. Yes.

Q. Finally, this red plastic bag down here?

A. Correct, yes.

Q. I'm going to ask you some questions about those items.

First, Detective Sopata, this black computer bag, is this a photograph of that same computer bag having been pulled out of the jeep?

A. Yes, it is.

Q. What do you see here in this spot here, this brown item?

A. A brown paper bag.

[71]

Q. And this is again, I don't know if I said AJSW-14.

I'm going to show you the next photograph in the series. AJSW-15, what is depicted here in AJSW-15?

A. The money that was inside of that brown paper bag.

Q. Was the money sort of secured this way with these rubber bands when you seized it or did you all apply those rubber bands?

A. Just as it was, that's how it was found. We did not put the rubber bands on it.

Q. Did you have to take the money out of the bags for purposes of the photo?

A. Yes, photo.

Q. I'm going to show you AJSW-16. Do you see that photograph?

A. Yes.

Q. I'm going to zoom in a little bit here. What is this item here in the middle of the computer bag?

A. Another bundle of money.

Q. Was that bundle of money secured with these rubber bands when you found it?

A. Yes, in that compartment of that bag.

Q. Was it contained in any other bag within this?

A. No, just the black briefcase bag, computer bag.

Q. Then I'm going to show you AJSW-17. Do you see that?

A. Yes.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL, DEFENDANTS

Dec. 10, 2007
9:45 a.m.

AM SESSION
VOLUME 17
TRANSCRIPT OF JURY TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

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Washington, D.C. 20560
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For Defendant Jones: EDUARDO BALAREZO,
Esquire
400 Fifth Street, NW Suite, 500
Washington, D.C. 20001

* * * * *

[19]

MR. GEISE: Yes, Your Honor.

(Government Exhibit Number DJ-SW-1 was admitted into evidence.)

BY MR. GEISE:

Q Now, sir, after you made entry and identified the people in the house, did you begin to search?

A At that point, after we placed the letters in the rooms and we took photographs of the entire apartment as it was, then after that, then we would begin the search.

Q Would you just describe what you located as you went throughout that house?

A Up in the bedroom where the two individuals, the only two individuals in the apartment were located, we found a bag, a black bag that had a bunch of powder cocaine in it. We also found a, like a fanny pack that had a little bit of powder cocaine in the same room. We found a large amount of U.S. currency. It was roughly $12,545 approximately. There were several vehicles located in—

Q Now, of the items you're describing, before we get to the vehicles, they were all located in the same room?

A Besides the vehicles, of the ones that I've described at this point, yes.

Q. I'm showing you DJ-SW-1, which is three pages. This is the sketch of the second floor of that house, the upstairs. Which room was this?

[20]

A It was the room that's labeled J, as in Juliet, here.

Q What kind of room was it?

A It was the master bedroom.

Q Showing you what's marked for identification at this point as DJ-SW-3, 7, 9, 10 and 12.

THE COURT: Three, 7, 9—

MR. GEISE: Ten and 12, Your Honor.

BY MR. GEISE:

Q Just ask you if you recognize DJ Search Warrant, DJ-SW-3, 7, 9, 10 and 11?

A Yes, these are all photos of the residence from the search warrant.

Q Are those of the search of that Room J, as in Juliet?

A Let me just make sure they were all there. Yes. Yes, they are.

Q Do they accurately represent the items as you saw them at the time?

A Yes, they do.

Q Possibly open for photographing?

A Yes.

MR. GEISE: Your Honor, I move the admission of Government's Exhibit DJ-SW-3, 7, 9, 10, and 12.

THE COURT: Any objection?

MR. BALAREZO: No, Your Honor.

THE COURT: Mr. Lyons?

[21]

MR. LYONS: No objection.

THE COURT: Three, 7, 9, 10 and 12.

(Government Exhibit Numbers DJ-SW-3, 7, 9, 10 and 12 were admitted into evidence.)

BY MR. GEISE:

Q Now, sir, you were describing the items that were found in that bedroom. Let's start with Photo DJ-SW-3. Please describe what you found and how it's photographed?

A This is a bag I was referring to. I believe it's a Nike sports bag, type of gym bag. And inside, as you can see from here, are different bags of white powder. Some of this powder was field tested positive for cocaine.

Q Was that a larger or smaller quantity of cocaine found there?

A I would say it's a larger quantity.

Q Now, showing you what's been marked for identification as DJ-SW-2 and ask if you recognize DJ-SW-2?

A Yes, I do.

Q What is that?

A This is the powder itself after the DEA and FBI anaysis.

Q The powder found in that gym bag?

A It is, correct.

Q Before we move on, let me show you what's been marked for identification at this point as DJ-SW-5. Do you recognize DJ-SW-5?

[22]

A Yes, I do.

Q What's that?

A This is the black bag in the photograph that originally contained that powder from Room J in this residence.

MR. GEISE: Court's indulgence while I consult Mr. Balarezo.

(There was a pause in the proceedings.)

MR. GEISE: Your Honor, I move the admission of Government's Exhibit DJ-SW-5.

MR. BALAREZO: No objection.

MR. LYONS: No objection.

THE COURT: All right.

(Government Exhibit Number DJ-SW-5 was admitted into evidence.)

BY MR. GEISE:

Q DJ-SW-2, there's a stipulation that the item was received, heat sealed intact at the DEA laboratory. And the analysis there demonstrates that it's 589.8 grams of cocaine hydrochloride?

THE COURT: Powder cocaine?

MR. GEISE: Yes, Your Honor, powder cocaine.

THE COURT: Have we admitted 2?

MR. GEISE: I would go ahead and move the admission of 2 now, Your Honor.

THE COURT: Any objection to 2?

* * * * *

[27]

admitted into evidence.)

BY MR. GEISE:

Q Just an example, sir, is that one of the baggies?

A It appears to be one of the baggies that came out of that shaving kit, yes.

THE COURT: Is that an Apple Ipod sign or what?

MR. GEISE: It says Apple bag, Your Honor.

THE WITNESS: Okay.

BY MR. GEISE:

Q Showing you Government's Exhibit DJ-SW-15, what is DJ-SW-15?

A This is a Prince George's County Association of Realtors, Inc., Prince George's County, Maryland, single

family dwelling lease for 10441 Crescent Parkway, Waldorf, Maryland.

Q In the name of?

A Demetrius C. Johnson.

MR. GEISE: Your Honor, I move the admission of DJ-SW-15.

THE COURT: Any objection?

MR. BALAREZO: No, You're Honor.

MR. LYONS: No, Your Honor.

THE COURT: Fifteen is admitted.

(Government Exhibit Number DJ-SW-15 was admitted into evidence.)

BY MR. GEISE:

[28]

Q Now sir, DJ-SW-4, which at the moment is marked for identification.

A Yes.

Q What is that?

A That's a digital scale that was located in the top left dresser drawer of Room J in this residence.

Q You mentioned, sir, there was also some cash located in the residence?

A There was.

Q Let me show you Government's Exhibit DJ-SW-12.

A Yes.

Q Approximately how much cash was found?

A That's approximately $12,545.

Q Now, moving on to other rooms, sir, did you also search the garage?

A Yes, we did.

Q Would you describe what you found in the garage?

A In the garage, the largest item in the garage was a nice BMW.

Q Did you find anything else in the garage?

A Found some documents, and we also found some kind of passes or tickets to a club.

Q Was that to Club Levels?

A I believe so. Could I examine those?

Q Sure. Showing you, just so it's clear on the record,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Dec. 17, 2007
2:20 p.m.
Day 18

PM SESSION
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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APPEARANCES:

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* * * * *

[59]

sort of slanted line. Is this where you made entry? Is this the doorway?

A. Correct.

Q. There are rooms that are now labeled living room, dining room, kitchen, bedroom A, bedroom F, and bedroom C. Where in this sketch was the young—the 15-year-old young man located?

A. He was in bedroom C.

Q. So that's here?

A. Uh-hmm.

Q. After you had secured the location and began the search, were there specific items of evidence, contraband that you located within the residence?

A. Yes, multiple items.

Q. Before we get to those multiple items, what room in the residence were all of those items located?

A. All were located in bedroom A, which was labeled the master bedroom.

Q. That's where I'm indicating here BR-A; is that right?

A. Correct.

Q. I want to start first with narcotics. Did you locate narcotics in bedroom A, the master bedroom of the residence of Michael Huggins?

A. Yes.

Q. Specifically, do you recall where you located narcotics?

A. There were two places in that bedroom. One was under the [60] master bed, under the bed itself. And then inside a chest of drawers. Smaller quantity inside the chest of drawers.

Q. I'm going to show you MH-SW-13. Is that the chest of drawers you're talking about?

A. Yes.

Q. What is this item here?

A. That's A digital scale. And then you can see on top of it a little clear plastic bag that had a small quantity of cocaine.

Q. I'm going to show you a sort of more close-up photograph there. Is that a close-up of that same two items, actually still located in the dresser drawer?

A. Yes.

MS. LIEBER: Your Honor, I'm showing defense counsel MH-SW-6 and MH-SW-7.

BY MS. LIEBER:

Q. Special Agent Ashby, I'm showing you MH-SW-6 and 7, and ask you if you recognize these items?

A. Yes.

Q. First of all, what is MH-SW-6?

A. Six is the small amount of cocaine that was found in the bag, in the picture depicted. It's ground up now, but it's—this is the original bag that it was in.

Q. Now, you say it's ground up now. I'm going to put that picture back up, MH-SW-14, and zoom in on the top portion.

* * * * *

[63]

sir?

A. When you open up the bag, clearly see a another clear bag that contained a larger quantity of cocaine.

MS. LIEBER: Your Honor, I'm showing to defense counsel MH-SW-4 and MH-SW-12.

THE COURT: Four?

MS. LIEBER: Four and 12.

THE DEPUTY CLERK: Twelve is the scale.

THE COURT: A[illegible] objections to four and 12?

MR. BALAREZO: No, Your Honor.

(Government's Exhibit Nos. MH-SW-4 and SW-12 received in evidence.)

BY MS. LIEBER:

Q. Special Agents Ashby, first, what is MH-SW-4?

A. Four is the drugs; 12 is the scale.

Q. Okay. Those are the items that you saw in the shoebox?

A. That's correct.

MS. LIEBER: Your Honor, pursuant to the stipulation that we've been reading, the chemist stipulation, items found at 5119 Barto Avenue, Suitland, Maryland, the stipulation is as follows: MH-SW-4 was analyzed by the DEA, and came back as 125.6 grams of cocaine hydrochloride. MH-SW-6, analyzed and came back as 6.5 grams of cocaine hydrochloride.

THE COURT: All right. The hydrochloride is the same thing as powder, for the jurors. Okay.

[64]

BY MS. LIEBER:

Q. Special Agent Ashby, did you also locate money in the bedroom, the master bedroom, at the residence of Michael Huggins?

A. Yes, in two different locations.

Q. Okay. Tell the jury where you found money?

A. One, I guess you call it a bundle of money, which totaled approximately $5,700 cash, was found in be-

tween the mattress and the box spring of the same bed the drugs were found under.

Q. I'm sorry, if I can show you that picture, since we're on it. MH-SW-18, do you see that?

A. I do.

Q. What is that a photograph of?

A. That's the bundle of money.

Q. Is that here in the middle?

A. Yes.

Q. What is this sort of beige-colored item up here?

A. That's the mattress flipped up, with the box spring underneath.

Q. MH-SW-19, is that just a close-up of that same bundle of money, still in the bedding?

A. Yes.

Q. And you found a second bundle of money?

A. Yes.

Q. How much money was that?

[65]

A. The other bundle of money, again, I think it was approximately $5,000, another close amount. This was found in a little wall safe that was kind of secreted in the closet that was—if you put the diagram back up. As you—yeah, right—if you raise your pen up a little higher. Right there. See that? That's a closest right there.

Q. Okay.

A. There was a little wall. As you came in, there was a little hallway that let into bedroom A, and that little closet right there. There you go. Built-in safe, clearly marked there.

Q. This sort of diagonal line here with the curve, is this the doorway?

A. That's the door, yes.

Q. And here is a little entry hallway—

A. Correct.

Q. —into bedroom A?

A. Correct.

Q. Where it says CL, and CL, is that the closet?

A. Closet, yes.

Q. And the built-in safe was—

A. Just built right into the wall. When I say safe, it was more like a metal door. I think we were able to just pry it open with a screwdriver. It wasn't like a combination safe. But inside that, there was another bundle of money. You would

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[81]

THE DEPUTY CLERK: Fourteen is in now. And three is in now.

THE COURT: All right. Fourteen is in and three is in now, correct?

MR. GEISE: I believe that is correct, Your Honor.

THE COURT: Fourteen, three, what about—I thought you had put in seven already, but I apparently am wrong. Any objection to seven?

THE DEPUTY CLERK: Seven and 16, Judge.

THE COURT: Seven and 16 were the other ones marked, but I don't think they've been formally admitted.

MR. BALAREZO: No objection to seven.

THE COURT: Sixteen? Is that—

MR. BALAREZO: No objection to 16.

THE COURT: So everything now is in.

THE DEPUTY CLERK: Yes.

THE COURT: Well, not everything. One, three, five, six and seven, 11, 14, 15, 15-A and 16. We agree?

All right, go ahead. What number are you on now?

MR. GEISE: Well, Your Honor, I was going to read from the chemist stipulation as to JA-SW-14. Chemist stipulation, which we've referenced before: Parties agree that the analysis of JA-SW-14 was 88.2 grams of cocaine hydrochloride.

THE COURT: 88 grams, powdered cocaine. Okay.

[82]

BY MR. GEISE:

Q. Now, Detective Kirschner, showing you what's I believe already been admitted as Government's Exhibit JA-SW-4. What is JA-SW—what is JA-SW-4, sir?

A. That's a ziplock plastic bag containing white powder, which was later identified as cocaine.

THE COURT: What? I didn't hear the end of your sentence.

THE WITNESS: Was later identified as cocaine.

BY MR. GEISE:

Q. Where was this photo taken, sir?

A. This was the bedroom which was marked with the letter M.

MR. GEISE: Your Honor, I don't believe it's in evidence yet, JA-SW-4?

THE COURT: Yeah, but he didn't finish his sentence. It's in the bedroom?

THE WITNESS: In the bedroom there's a headboard with shelves, and a shelves that goes up high. This is a corner of that shelf that was up high.

MR. GEISE: Your Honor, I'd move the admission of JA-SW-4?

THE COURT: Any objection?

MR. BALAREZO: No.

THE COURT: Admitted then.

(Government's Exhibit No. JA-SW-4 received in evidence.)

[83]

THE COURT: One second. Okay.

BY MR. GEISE:

Q. And where was the bed located, sir?

A. In bedroom M.

Q. I show you what's I believe already admitted, Government's JA-SW-3. What is JA-SW-3?

A. It's a DEA envelope from the lab. And inside it is my plastic bag that I wrote where it was recovered from and when, and—along with the cocaine and the plastic bag it was in that day.

Q. Is that the drugs pictured in JA-SW-4?

A. Yes, it is.

MR. GEISE: Again, Your Honor, referencing the chemist stipulation, that JA-SW-3 was analyzed as 28.5 grams of cocaine hydrochloride.

THE COURT: 28.5?

MR. GEISE: Yes, Your Honor.

THE COURT: Okay.

BY MR. GEISE:

Q. Now, Detective Kirschner, showing you again what I believe has been admitted as Government's Exhibit JA-W-5. Again, I ask you if you recognize JA-SW-5, and tell us what it is?

A. Yes, I do. It's a boot box from the closet in room M, and it contains cash which counted out to $9,600.

Q. And that's room M, that master bedroom?

[84]

A. The master bedroom once again, yes.

Q. Now, on Government's Exhibits JA-SW-16 and JA-SW-7, and I ask you if you recognize them and where they are found?

A. JA-SW-7 was found, once again, in the bedroom marked M, on the headboard, the shelving. And it's a folded frame with a picture.

Q. Do you recognize the people in the picture?

A. I recognize two of them.

Q. Who are they?

A. It's John Adams standing with the hat on, and Adrian Jackson kneeling in front of him.

Q. And Government's Exhibit JA-SW-16?

A. This is an electronic scale that was recovered from the kitchen in the cupboard above the dishwasher.

Q. Now, showing you Government's Exhibit JA-SW-6 and JA-SW-17, asking if you recognize them and what they are?

A. Yes. This is—

Q. Well, which reference?

A. I'm sorry. That's JA-SW-6, and it's a pay stub from Levels Entertainment Incorporated, 1960 Montana Avenue, Northeast, Washington, D.C., in the name of John Adams at 5703 Gloria Drive, Suitland, Maryland.

Q. And Government's Exhibit JA-SW-17?

A. It's a letter from the Internal Revenue Service to John [85] Adams at 5703 Gloria Drive, Suitland, Maryland.

Q. And Government's Exhibit JA-SW-6 and JA-SW-17, where are those recovered, sir?

A. JA-SW-6 was recovered from the headboard, once again, in room M, the master bedroom.

THE COURT: Six is in, but not 17.

MR. GEISE: And, Your Honor, I'd move the admission of JA-SW-17?

THE COURT: Any objection, IRS?

MR. BALAREZO: I had expressed to Ms. Lieber, I'm sorry.

MS. LIEBER: Yes. Your Honor, we'll make the appropriate redactions for Mr. Balarezo.

THE COURT: All right. Fine. Okay. We don't want Social Security numbers and things.

MR. GEISE: That's exactly right, Your Honor.

(Government's Exhibit No. JA-SW-17 received in evidence.)

THE WITNESS: This was recovered from the closet just outside of bedroom M. It's a utility closet that was marked with the letter P, as in Paul.

BY MR. GEISE:

Q. When you came in with the search of that home – I'm going to show you JA-SW-9, which is already in evidence.

THE DEPUTY CLERK: No, it's not.

[86]

MR. GEISE: I'm sorry. Your Honor, JA-SW-9 and JA-SW-11, two photos.

THE COURT: Nine and 11, I think no objection?

MR. BALAREZO: No objection.

THE COURT: All right.

(Government's Exhibit Nos. JA-SW-9 and SW-11 received in evidence.)

BY MR. GEISE:

Q. JA-SW-9, what is JA-SW-9?

A. It's a photograph of a Intratec 45 handgun, that was inside of another boot box, which was recovered from the closet of room M, the master bedroom.

Q. And again, room M?

A. Yes.

Q. Showing you what's been marked for identification as JA-SW-8. I ask you to look at that and tell me if you recognize it?

A. Yes, it's the gun that was in the previous picture.

MR. GEISE: Your Honor, I'd move the admission of JA-SW-8?

MR. BALAREZO: No objection.

THE COURT: Eight is admitted.

(Government's Exhibit No. JA-SW-8 received in evidence.)

BY MR. GEISE:

Q. And just so we've got the reference, that's the gun that's [87] shown in picture nine, which is already in evidence?

A. Yes, it is.

Q. Now, I believe this is already in evidence, JA-SW-11. And I ask if you recognize JA-SW-11?

A. Yes.

Q. What is that?

A. That's a Smith & Wesson .357 revolver.

Q. Where was that found?

A. In the basement bedroom of the residence.

Q. Showing you what's been marked for identification as JA-SW-10. Do you recognize that?

A. Yes.

MR. GEISE: Your Honor, I'd move the admission of JA-SW-10?

MR. BALAREZO: No objection.

THE COURT: Ten is admitted.

(Government's Exhibit No. JA-SW-10 received in evidence.)

BY MR. GEISE:

Q. What is that, sir?

A. It's the .357 Smith & Wesson revolver that was in the picture. It was loaded at the time with three rounds of .357. And the black handgun we previously showed, it was loaded with six rounds of ammunition.

Q. Which, for obvious reason, have been removed?

[88]

A. Have been removed, yes.

MR. GEISE: I'm not sure if JA-SW-2 has been admitted yet?

THE DEPUTY CLERK: It's not.

THE COURT: No, it hasn't.

MR. GEISE: Your Honor, I'd move the admission of JA-SW-2?

MR. BALAREZO: No objection.

MR. LYONS: No objection.

THE COURT: Okay.

(Government's Exhibit No. JA-SW-2 received in evidence.)

BY MR. GEISE:

Q. Detective Kirschner, what is JA-SW-2?

A. It's a folding knife, razor blades and a scraper, inside of the plastic container.

Q. Where were those recovered from?

A. The items in the plastic container were recovered, once again from room M, on top of the, on top of the headboard on that top shelve.

Q. Showing you again photo four which is in evidence, JA-SW-4?

A. That's the shelve, but it was further down to the right, it was recovered. And the plastic container is ours, to protect anybody that handles it.

Q. Detective Kirschner, one question on another role you

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Dec. 20, 2007
9:45 a.m.
Volume 21

A.M. SESSION
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

---

APPEARANCES:

For the Government: JACK GEISE, Esquire
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For Defendant Jones: EDUARDO BALAREZO,
Esquire
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Washington, DC 20001

* * * * *

[48]

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BY MR. BALAREZO:

Q. Good morning, ma'am. Could you please state your name and spell it for us.

A. Deniece Jones, D-E-N-I-E-C-E.

Q. Just generally ma'am, approximately how old are you, not [49] specifically, approximately?

A. Early forties.

Q. How far did you get in school, ma'am?

A. I have an associates degree in accounting.

Q. Where did you go to school?

A. Prince George's Community College.

Q. Could you speak up so we can hear you? You said associate degree in accounting at Prince George's Community College?

A. That's correct.

Q. Have you had any other education subsequent to that?

A. I've also, I have a real estate license in the state of Maryland that required 60 hours of real estate training.

Q. Are you married, ma'am?

A. Yes, I am.

Q. Who are you married to?

A. Antoine Jones.

* * * * *

[67]

* * * * *

Q. I'm going to ask you a series of questions now about some property that you own, specifically some vehicles. Are you familiar with – this is Government Photo Number 20, which is in evidence. Do you recognize that particular vehicle there, ma'am?

A. Yes, I do.

[68]

Q. What do you recognize it to be?

A. That's a Jeep Cherokee that I own.

Q. You said you own. Did you purchase it?

A. Yes, I did.

Q. Did you purchase it from a dealer?

A. Yes, I did.

Q. A car dealer I mean?

A. Yes, sir.

Q. Did you walk in there with a shopping bag full of cash?

A. No, sir.

Q. How did you purchase that vehicle?

A. I got a loan with Chrysler Financial.

Q. Were you making payments on that car?

A. Yes, I was.

Q. How often were you making payments on that car?

A. Monthly.

Q. How long was the loan for?

A. I believe it was a five-year loan.

* * * * *

[69]

* * * * *

BY MR. BALAREZO:

Q. You also had, I'll describe it, a vehicle, a truck called a Sequoia or something. We're looking for pictures.

A. Yes, sir.

Q. Can you tell us anything about that particular vehicle?

A. Yes. My husband bought the Sequoia, I believe, either 2002 or 2003.

Q. Was that just in his name? Let me step back with the Jeep. Was that in your name or his name? Do you remember?

A. The Jeep was in my name alone.

Q. When did you get the Jeep?

A. I believe it was May 2001. It was roughly May 2001.

Q. So you had that Jeep already when Mr. Jones came home?

A. Yes, sir.

* * * * *

[71]

* * * * *

Q. Who used the Jeep mostly?

A. He ended up driving the Jeep more than me.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Jan. 3, 2008
9:20 a.m.

AM SESSION
VOLUME 23
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

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For Defendant Jones: EDUARDO BALAREZO,
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Washington, D.C. 20001

* * * * *

[113] [MR. GEISE]

* * * * *

Now you know there are some limitations to that GPS device. It doesn't give you a perfect address. You've heard quite a bit about it. You've got some exhibits. Just as an example, these will all go back with you, you've got little color-coded maps of various times when the GPS was reporting. And I believe that's Government's Exhibit GPS-12 you're looking at.

There is Government's Exhibit GPS-1, which is a summary of a number of dates and times showing a phone call. For instance, the first day the GPS is active, 9-27, there is a phone call, 2602, to Carlos Reyna, between Reyna, Charlie, and the defendant, at 8:54 P.M. The defendant says to Charlie, "Coming to see you later on." And the GPS shows the arrival at Potomac Drive at 9:51 P.M. and a departure at 10:31 P.M.

[114]

You've heard testimony from Special Agent Bitsie, I think, who was the FBI GPS expert. The system is not perfect. It does not give you an exact address, but it gives you a pretty accurate reading within a hundred yards or so of where a vehicle is.

And what you ask yourself as we go through this is, when there is a conversation with Roel Bermea or Charlie Reyna and the defendant says, I'm coming to see you,

or I'll be there in ten minutes, and within a while, maybe ten minutes the way we take ten-minute breaks, but within an hour or two, the GPS shows that that vehicle is in Potomac Drive, how does that all fit together? Well, it fits together exactly as you know. That the defendant is going to 9508 Potomac Drive, and there's no reason anyone goes there other than drug activity.

And indeed, as the timeline shows you and that exhibit we just saw, on September 27th, the day the device goes active, the GPS, at 8:54 P.M., the conversation, and that's at Conversation 2602 on Page 22 of your transcripts, defendant and Charlie Reyna talk. Then it says, he will be see him later on. Reyna says, "Okay. I have more work for you." And the GPS shows about I guess an hour later at 9:51 P.M., the Jeep arrives at the Potomac Drive area and remains for about an hour.

Within the next day or so, you recall, Roel Bermea tells you he's there. And he begins to talk with defendant [115] Jones. They're waiting fo the Primo's drugs are about to be completed. The rest of the group is going to go back to Texas. And Bermea is going to start distributing the drugs that Pelos is going to supply.

And then there are a series of calls and GPS readings between the defendant and Roel Bermea. There is a little overlap where Reyna is still selling the remaining drugs from Primo. And Bermea is there awaiting the first Pelos shipment. Then there's like a hand-off, like a baton in a race, a hand-off from Charlie Reyna to Roel Bermea. And we begin to have the conversations between the defendant and Roel Bermea.

Recall, of course, that that, Roel Bermea is ultimately arrested. And the cell phone that he is having his conversations with the defendant on is found at 9508, and

the defendant's phone number is found in the memory of that phone. I think you'll recall Mr. Balarezo asking Detective Webb whether—Detective Webb is the agent who put in most of the physical evidence seized at 9508.

Recall him asking Detective Webb, well, did you find Antoine Jones' name anywhere. Well, detective Webb said no. But of course he did not look at the memory of those phones. The phone being used by Roel Bermea and, of course, no surprise, since it's intercepted talking to the defendant many times, that defendant's phone number is in the memory of that [116] phone.

So, let's spend just a little bit more time talking about what's going on there. And we'll use the timeline for a bit. Let's look at the transcripts. That's probably just as easy and quicker. You will recall—let's look at Page 23 of the transcripts, 9-28, the defendant is talking to Reyna. And in the middle of the conversation, defendant Jones says to Reyna, "Troy come." And you will recall this is when Roel Bermea said he has arrived.

And a little while later on the same day, Page 24 of your transcripts, the defendant is again talking to Carlos Reyna who tells him Roy is here. And the next day, on September 29th, Page 25 of your transcripts, there's the first conversation between the defendant and Roel Bermea where the defendant says, "15 minutes. And Bermea says, all right." And no surprise, if you look at the GPS system, it shows that at 8:26 that day, about an hour after this conversation, conversation that you're looking at on Page 25 is at 7:33 A.M., if you check the GPS, you'll find that approximately an hour later, the Jeep arrives in the area of Potomac Drive.

Then, that follows these series of conversations, day after day, GPS reading after GPS reading, with the de-

fendant speaking with Roel Bermea and then the vehicle coming to Potomac Drive. Just let's talk about a few of those that are notable because there's a whole series of them. [117] You'll have the timeline. You've got the conversations. I won't go through them all.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 05-386

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANTS

Jan. 7, 2008
9:20 a.m.

AM SESSION
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE ELLEN SEGAL HUVELLE UNITED STATES DISTRICT JUDGE, and a jury

---

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* * * * *

[173] [MS. LIEBER]

* * * * *

You have the GPS. You know, say what you will about technology and the vast power of the government, but, ladies and gentlemen, you do have the testimony from Detective Kirschner and this exhibit, GPS Number Two as an example. This wind track data where Detective Kirschner tells you, yes, in the raw data that comes spinning off the GPS disks, it does appear that the GPS is bouncing around everywhere.

But you also know about all these trees, right, the trees that surround Potomac Drive. And Agent Bitsie tells you that what the GPS tracker has to do is it has to get a clear piece of the sky. So if the satellite is sort of moving and they're trying to make this connection, and when you have trees, it makes it awfully difficult. And so that's when you get more of this bouncing around.

But when you put the data onto the tracker, it shows that this is a stationary jeep. And remember if you will that Detective Kirschner told you, there are only two or three houses in that area right there. That jeep was going in day after day to Potomac Drive in conjunction with, for heaven sake, these calls, right?

This is Government's GPS Number One. You have the call and the, I'm coming to see you later on or I'll be these in 15 minutes, or whatever the statement is on the

phone. And [174] within sort of a reasonable approximation of that amount of time, the GPS shows that the jeep is going to 9508 Potomac Drive.

Then you have sort of a layer on top of that as if the phones and the GPS and all of that weren't enough, and the calls themselves, you have the surveillance video camera that shows, for example, on October 14th, 2005, at 8:11 a.m., the jeep backing up out of the driveway at 9508 Potomac Drive. So to suggest that Mr. Jones is not connected to all the drugs and money found at that stash house is just silly.

223

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224

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PETITIONER'S BRIEF

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the warrantless use of a GPS tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment.

2. Whether the government violated respondent's Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent.

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In the Supreme Court of the United States

No. 10-1259

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 615 F.3d 544. The order of the court of appeals denying rehearing (Pet. App. 43a), and the opinions concurring in and dissenting from the denial of rehearing en banc (Pet. App. 44a-52a) are reported at 625 F.3d 766. The opinion of the district court granting in part and denying in part respondent's motion to suppress (Pet. App. 53a-88a) is published at 451 F. Supp. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2010. A petition for rehearing was denied on November 19, 2010 (Pet. App. 43a). On February 3, 2011, the Chief Justice extended the time within which

to file a petition for a writ of certiorari to and including March 18, 2011. On March 8, 2011, the Chief Justice further extended the time to and including April 15, 2011, and the petition for a writ of certiorari was filed on that date. The petition for a writ of certiorari was granted on June 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of conspiracy to distribute five kilograms or more of cocaine and 50 or more grams of cocaine base, in violation of 21 U.S.C. 841 and 21 U.S.C. 846. The district court sentenced respondent to life imprisonment. J.A. 66-76. The court of appeals reversed respondent's conviction. Pet. App. 1a-42a.

1. In 2004, a joint Safe Streets Task Force of the Federal Bureau of Investigation and the Metropolitan Police Department began investigating respondent, who owned and operated a nightclub in the District of Columbia, for cocaine trafficking. Pet. App. 2a, 54a. The agents used a variety of investigative techniques de-

signed to link respondent to his co-conspirators and to suspected stash locations for illegal drugs. The agents conducted visual surveillance and installed a fixed camera near respondent's nightclub, obtained pen register data showing the phone numbers of people with whom respondent communicated by cellular phone, and secured a Title III wire intercept for respondent's cellular phone. *Id.* at 54a-55a; J.A. 103-105; Resp. C.A. App. 218-222, 227-289.

In addition to those techniques, the agents obtained a warrant from a federal judge in the District of Columbia authorizing them to covertly install and monitor a global positioning system (GPS) tracking device on a Jeep Grand Cherokee registered to respondent's wife, but used primarily or exclusively by respondent, for up to 90 days. J.A. 21-34,[1] 100-101, 105-110; Pet. App. 15a-16a, 38a-39a; Resp. C.A. App. 512. The warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant, and only in the District of Columbia, but the agents did not install the device until 11 days after the warrant was issued, and they installed it while the Jeep was parked in a public parking lot in Maryland. Pet. App. 38a-39a; J.A. 93-100. Agents also later replaced the device's battery while the Jeep was located in a different public parking lot in Maryland. J.A. 110-112, 129-132, 144-146.

The GPS device communicated with orbital satellites to establish the device's location and was accurate within

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[1] The tracking-device warrant and affidavit reproduced at J.A. 21-34 were initially filed under seal at the government's request. They have, however, been reproduced as exhibits in this litigation in filings that are available to the public. See 1:05-cr-00386-ESH Docket entry No. 150-1 (D.D.C. July 23, 2006).

50 to 100 feet. J.A. 79-81. The device generated data only when the Jeep was moving, and it was capable of forwarding data to government agents using a cell-phone connection. J.A. 80-82, 118-121. When the vehicle was not moving, the device went into "sleeping mode" to conserve its battery. J.A. 83-85. The device provided information only about the vehicle's location; it did not reveal who was driving the car, what the driver and occupants were doing, or with whom they met at their destinations.

Using the device, agents were able to track respondent's Jeep in the vicinity of a suspected stash house in Fort Washington, Maryland, which confirmed other evidence of respondent driving his Jeep to and from that location. For example, respondent's presence at the Fort Washington stash house was also established by visual surveillance, including videotape and photographs of respondent driving his Jeep to and from that location. J.A. 122-124, 163-166.

Based on intercepted calls between respondent and his suspected suppliers, investigators believed that respondent was expecting a sizeable shipment of cocaine during late October 2005. J.A. 174-178. On October 24, 2005, agents executed search warrants at various locations. They recovered nearly $70,000 from respondent's Jeep, and they recovered wholesale quantities of cocaine, thousands of dollars in cash, firearms, digital scales, and other drug-packaging paraphernalia from respondent's suspected customers. J.A. 162-163, 181-185, 187-193, 195-209. Agents also recovered from the Fort Washington stash house approximately 97 kilograms of powder cocaine, almost one kilogram of crack cocaine, approximately $850,000 in cash, and various

items used to process and package narcotics. J.A. 148-160; Pet. App. 40a.

2. A federal grand jury sitting in the District of Columbia charged respondent with conspiring to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 21 U.S.C. 846; and 29 counts of using a communications facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Pet. App. 54a.

Before trial, respondent moved to suppress the data obtained from the GPS tracking device. J.A. 11-13. Relying on *United States* v. *Knotts*, 460 U.S. 276 (1983), and *United States* v. *Karo*, 468 U.S. 705 (1984), the district court granted the motion in part and denied it in part, explaining that data obtained from the GPS device while the Jeep was on public roads was admissible, but that any data obtained while the Jeep was parked inside the garage adjoining respondent's residence must be suppressed. Pet. App. 83a-85a. As a result, the GPS data introduced at trial related only to the movements of the Jeep on public roads. The jury acquitted respondent on a number of the charges and the district court declared a mistrial after the jury was unable to reach a verdict on the conspiracy charge. J.A. 15-17.

A grand jury charged respondent in a superseding indictment with a single count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 21 U.S.C. 846. J.A. 35-65. After a second trial, at which the GPS evidence again related only to the movements of the Jeep on public roads, a jury convicted respondent of the sole count in the indictment. Pet. App. 3a. The district court

sentenced respondent to life imprisonment and ordered him to forfeit $1,000,000 in proceeds from drug trafficking. J.A. 19, 66-76.

3. The court of appeals reversed respondent's conviction. Pet. App. 1a-42a.

a. The court acknowledged this Court's holding in *Knotts* that monitoring the public movements of a vehicle with the assistance of a beeper was not a search within the meaning of the Fourth Amendment because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Pet. App. 17a (quoting *Knotts*, 460 U.S. at 281). The court concluded, however, that *Knotts* was not controlling because the officers in that case monitored a "discrete journey" of about 100 miles, rather than conducting prolonged monitoring of a vehicle over the course of several weeks. *Id.* at 17a-19a. The court noted that *Knotts* reserved whether a warrant would be required before police could use electronic devices as part of a "dragnet-type law enforcement practice[]," such as "twenty-four hour surveillance." *Id.* at 17a-18a (quoting *Knotts*, 460 U.S. at 283-284).

b. After determining that it was not bound by *Knotts*, the court of appeals concluded that respondent had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month because he had not exposed the totality of those movements to the public. Pet. App. 22a-31a. The government's use of a GPS device to monitor those movements, the court held, was therefore a search within the meaning of the Fourth Amendment. *Id.* at 22a-35a; see *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

First, the court concluded that respondent's movements while he drove on public roads in his Jeep were not "actually exposed" to the public. Pet. App. 23a-27a. The court stated that "[i]n considering whether something is 'exposed' to the public as that term was used in *Katz*[,] we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." *Id.* at 23a. Applying that standard, the court concluded that "the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements * * * is essentially nil." *Id.* at 26a.

Second, the court rejected the argument that because each of respondent's individual movements was in public view, respondent's movements were "constructively exposed" to the public. Pet. App. 27a-31a. The court explained that "[w]hen it comes to privacy, * * * the whole may be more revealing than the parts." *Id.* at 27a. Applying a "mosaic" theory, the court reasoned that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble," which can "reveal more about a person than does any individual trip viewed in isolation." *Id.* at 29a. The court concluded that a reasonable person "does not expect anyone to monitor and retain a record of every time he drives his car * * * rather, he expects each of those movements to remain 'disconnected and anonymous.'" *Id.* at 31a.

Noting that seven States have enacted legislation requiring the government to obtain a warrant before it may use GPS tracking technology, Pet. App. 33a-34a,

the court of appeals further concluded that respondent's expectation of privacy in the month-long public movements of his Jeep was one that society was prepared to recognize as reasonable, *id.* at 31a-35a.

Having concluded that the GPS monitoring constituted a search, the court further considered whether that search was nevertheless reasonable under the Fourth Amendment. Pet. App. 38a-39a. The court rejected the government's argument that the search was reasonable because, under the "automobile exception" to the Fourth Amendment's warrant requirement, see *Maryland* v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974), the agents could have repeatedly searched respondent's vehicle based on probable cause without obtaining a warrant. Pet. App. 38a-39a. The court observed that the government had not raised this argument in the district court, but nevertheless rejected the argument on the merits, stating that "the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate." *Id.* at 39a.

c. The court of appeals rejected the government's argument that the court's decision could invalidate the use of prolonged visual surveillance of persons or vehicles located in public places and exposed to public view. Pet. App. 35a-38a. As a practical matter, the court suggested that police departments could not afford to collect the information generated by a GPS device through visual surveillance, but GPS monitoring, according to the court, "is not similarly constrained." *Id.* at 35a-36a.

The court also explained that the constitutionality of prolonged visual surveillance was not necessarily called into question by its decision, because "when it comes to the Fourth Amendment, means do matter." *Id.* at 37a (citation omitted). For example, the court explained, police do not need a warrant to obtain information through an undercover officer, but they need a warrant to wiretap a phone. *Ibid.* The court ultimately decided to "reserve the lawfulness of prolonged visual surveillance" for another day. *Id.* at 37a-38a.

d. Finally, the court concluded that the district court's error in admitting evidence obtained by use of the GPS device was not harmless. Pet. App. 39a-42a. The court rejected the government's contention that the other evidence linking respondent to the conspiracy was overwhelming and instead found that "the GPS data were essential to the Government's case." *Id.* at 41a. The court therefore reversed respondent's conviction. *Id.* at 1a-2a.

4. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 43a. Chief Judge Sentelle, joined by Judges Henderson, Brown, and Kavanaugh, dissented. *Id.* at 45a-49a. Chief Judge Sentelle explained that the panel's decision was inconsistent not only with the decisions of every other court of appeals to have considered the issue, but also with this Court's decision in *Knotts*. *Id.* at 45a. Chief Judge Sentelle observed that the Court's statement in *Knotts*, that nothing in the Fourth Amendment "prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," was "[c]entral to [its] reasoning." *Id.* at 46a (quoting *Knotts*, 460

U.S. at 282). He concluded that "[e]verything the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy," because "[t]here is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking [respondent] with a GPS." *Ibid.*

Chief Judge Sentelle found "unconvincing[]" the panel's attempt to distinguish *Knotts* "not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case," noting that "[t]he fact that no particular individual sees * * * all [of a person's public movements over the course of a month] does not make the movements any less public." Pet. App. 46a-47a. Chief Judge Sentelle also criticized the panel opinion for giving law enforcement officers no guidance about "at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private." *Id.* at 47a. He noted that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem." *Id.* at 48a.

With regard to the panel's holding that respondent acquired a reasonable expectation of privacy in the totality of his movements over the course of a month because "that whole reveals more . . . than does the sum of its parts," Chief Judge Sentelle stated that the panel had failed to explain how the whole/part distinction affects respondent's reasonable expectation of privacy. Pet. App. 47a-48a. He explained that "[t]he reasonable ex-

pectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." *Ibid.* Whatever the whole revealed, Chief Judge Sentelle explained, the test of the reasonable expectation is not "in any way related to the intent of the user of the data obtained by the surveillance or other alleged search." *Id.* at 48a.

Finally, Chief Judge Sentelle noted, "[l]est the importance of this opinion be underestimated," that because the panel found that the privacy invasion was not in the agents' using a GPS device, "but in the aggregation of the information obtained," Pet. App. 48a, the panel's opinion calls into question "any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel," *ibid.* Chief Judge Sentelle could not "discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented surveillance and a purely visual surveillance of substantial length." *Id.* at 48a-49a.

Judge Kavanaugh also dissented. Pet. App. 49a-52a. In addition to the reasons set forth by Chief Judge Sentelle, Judge Kavanaugh would have granted rehearing to resolve respondent's alternative claim on appeal, which the panel did not address, that the initial warrantless installation of the GPS device on his car violated the Fourth Amendment because it was "an unauthorized physical encroachment within a constitutionally protected area." *Ibid.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The installation and use of a GPS device to monitor the movements of respondent's vehicle on public roadways did not violate the Fourth Amendment.

I. A. In *Katz* v. *United States*, 389 U.S. 347, 351 (1967), this Court recognized that the privacy interests safeguarded by the Fourth Amendment do not extend to matters "knowingly expose[d] to the public." Under that principle, officers do not conduct a "search" when they observe matters conducted in the open, which anyone could see.

1. In *United States* v. *Knotts*, 460 U.S. 276, 283-285 (1983), the Court made clear that technological enhancements in the ability to observe matters "knowingly expose[d] to the public" do not render those observations a search. *Knotts*, like this case, involved the use of a tracking device to monitor the movements of a vehicle on public roads. The tracking device in that case—a beeper—enabled officers to maintain surveillance of the vehicle's movements when visual observations failed. But the Court made clear that its use did not constitute a search. A person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.

2. The court of appeals concluded that the use of the GPS device to monitor the movements of respondent's vehicle infringed his reasonable expectation of privacy because the likelihood that any person would observe his movements over a month is "essentially nil." Pet. App. 26a. But this Court has never applied a test that turned on the likelihood that matters exposed to the public would actually be observed in order to determine whether a search has taken place. The Court in *Knotts*

referred to what officers "could have observed" without use of the beeper, 460 U.S. at 285, not what a private individual *likely* would have observed. Similarly, in *Smith* v. *Maryland*, 442 U.S. 735, 745 (1979), the Court placed no weight on whether a phone company would actually compile, print, and review a log of all telephone calls a customer made; what mattered was that the customer conveyed the numbers to the company which was "free" to record them in a list.

Any rule that looks to the "likelihood" that a private person would acquire the same information that the police obtain by monitoring a car's public movements would be wholly unworkable. Police could not predict when prolonged GPS tracking would cross some ill-defined "likelihood" limit keyed to hypothetical actions by members of the public. And such a test is an unreliable gauge of privacy: any individual who moves on public roadways knows that his movements can be readily observed. Respondent, for example, had to be aware that any neighbor could have observed his frequent visits to his Fort Washington stash house.

3. The court of appeals also relied on a "mosaic" theory to justify the conclusion that prolonged GPS monitoring was a search, positing that the entirety of a vehicle's movements over a month reveals patterns and habits that are not evident in "short-term surveillance." Pet. App. 29a. But this Court's cases do not support a "mosaic" approach. The governing principle is that the observation of matters knowingly exposed to the public is not a search, and that principle applies to any travel on public roadways. In *Knotts*, the Court relied solely on the fact that the monitored vehicle was driving on the public roadways, not on a view that the beeper moni-

tored only a single journey. And in *United States* v. *Karo*, 468 U.S. 705 (1984), the Court applied the same principle in holding that months-long beeper and visual surveillance of public movements of an item carried in a vehicle was not a search. The court of appeals found support for its "mosaic" theory only in a Freedom of Information Act decision pertaining to rap sheets and a misinterpretation of a portion of *Smith* that rejected any *subjective* expectation of privacy in the numbers dialed because the telephone company furnished customers with a list of calls. Neither case supports recognizing an expectation of privacy when driving a car on public streets because prolonged observations reveal patterns.

In addition, the "mosaic" theory is unworkable. Law enforcement officers could not predict when their observations of public movements would yield a larger pattern and convert legitimate short-term surveillance into a search. Courts would be hard pressed to pinpoint that moment even in retrospect. And the extension of the mosaic theory to other non-search investigatory techniques that, in the aggregate, reveal patterns—such as pen registers, trash pulls, review of bank records, and visual surveillance—would deeply unsettle Fourth Amendment law and cloud the validity of a host of standard police practices.

B. Law enforcement has not abused GPS technology. No evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote. As this Court has previously indicated, if "dragnet" use of tracking technology occurs in the future, its constitutional implications can be addressed at that time. *Knotts*, 460 U.S. at 283-284. And if prophylactic protections are deemed warranted to address law

enforcement techniques that do not constitute a "search" or "seizure," the legislative process is the appropriate way to address them.

C. Applying this Court's doctrine, the use of a GPS tracking device to monitor the movements of respondent's vehicle on public streets was not a search. All of the Jeep's movements were unquestionably exposed to public view. Respondent did not have a justifiable expectation that his public movements would remain invisible to private or government observation.

II. The government's attachment of a GPS tracking device to respondent's vehicle, as distinct from its use to track the vehicle's public movements, also did not violate the Fourth Amendment. No warrant was required because the attachment of the device was neither a search nor a seizure.

A. Attaching a tracking device to a vehicle's exterior is not a search because the attachment reveals no information at all, and certainly no private information. The attachment of a tracking device to a vehicle's exterior creates, at most, only the *potential* for a search, in that the tracking device might subsequently be monitored in a private area. But a potential invasion of privacy does not constitute a search. *Karo*, 468 U.S. at 712.

B. Attaching a tracking device is also not a seizure. A seizure within the meaning of the Fourth Amendment requires a meaningful interference with an individual's possessory interest in the property. Installation of the GPS device on respondent's car did not draw power from the vehicle, prevent respondent from driving it, or occupy space that could have been used for passengers or packages. At most, it involved a technical trespass on

the space occupied by the device, but that is insufficient to amount to a seizure.

III. Even if installing or using the GPS tracking device was a search or seizure, it was reasonable under the Fourth Amendment. In assessing Fourth Amendment reasonableness, this Court has balanced the nature and degree of the intrusion against the governmental interests supporting the investigatory technique. It has frequently struck the balance against requiring a warrant and probable cause when the intrusion is modest and the government interests are significant or inconsistent with the warrant procedure. In this context, neither probable cause nor a warrant should be required. A GPS device does not conduct a visual or aural search of the item to which it is attached, it is used to gather information that could be observed by any member of the public, and cars have traditionally been afforded diminished Fourth Amendment protection. On the other side of the ledger, a critically important use of GPS surveillance is at the beginning stages of an investigation, to *establish* probable cause. The warrantless surveillance here, which was supported by at least reasonable suspicion, is valid under that test.

ARGUMENT

I. THE USE OF A GPS TRACKING DEVICE TO MONITOR THE MOVEMENTS OF RESPONDENT'S VEHICLE ON PUBLIC STREETS WAS NOT A SEARCH UNDER THE FOURTH AMENDMENT

A. Individuals Have No Reasonable Expectation Of Privacy In Information That Is Exposed To Public View

In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court held that the use of an electronic listening device that was attached to the outside of a public telephone booth constituted a Fourth Amendment search. *Id.* at 352-353. *Katz* recognized that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure," *id.* at 353, but instead depends on the reasonable expectations of privacy that an individual has in a particular place at a particular time. As formulated in Justice Harlan's concurrence in *Katz*, the protection of the Fourth Amendment requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361; see *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's formulation).

Katz found a search because a person who uses a telephone booth seeks "to exclude * * * the uninvited ear" from the conversation, 389 U.S. at 352, and the government's interception of the conversation "violated the privacy upon which [the defendant] justifiably relied," *id.* at 353. But the Court recognized that, under reasonable-expectation-of-privacy analysis, "[w]hat a

person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Id.* at 351.

The Court's post-*Katz* search jurisprudence has consistently distinguished between matters kept private and matters exposed to public view. In *Oliver* v. *United States*, 466 U.S. 170 (1984), the Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields." *Id.* at 178. The Court explained that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance" and that "as a practical matter these lands usually are accessible to the public and the police." *Id.* at 179. And in *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), the Court held that a state health inspector did not conduct a search when he observed smoke emanating from an industrial plant, because the inspector "had sighted what anyone in the city who was near the plant could see." *Id.* at 865.

These cases demonstrate the principle that a person has no reasonable expectation of privacy in information that is exposed to public view. When police officers acquire that information, they do not conduct a search within the meaning of the Fourth Amendment.

1. The use of technology to acquire information exposed to public view does not affect the reasonable expectation of privacy in that information

With advances in technology, law enforcement officers have become more efficient in conducting criminal investigations. This Court's decisions establish, however, that the distinction drawn in *Katz* between private information and information that is "expose[d] to the public" remains the relevant inquiry to determine

whether a particular form of government surveillance constitutes a search. 389 U.S. at 351. The Fourth Amendment does not preclude the government from using technology to collect information that is in public view, because the technology does not make the information collected any less public. The government does conduct a search, however, if it uses technology to detect private activities occurring in private areas.

a. In *United States* v. *Knotts*, 460 U.S. 276 (1983), the Court applied the reasonable-expectation-of-privacy framework to conclude that no search had occurred when law enforcement officers used an electronic tracking device to monitor the movements of a vehicle on public roads. The officers in *Knotts*, without obtaining a warrant, had installed an electronic beeper in a container of chemicals in Minneapolis, Minnesota, that was subsequently transported in a vehicle. *Id.* at 277. Officers followed the vehicle on part of its journey, but they ceased visual surveillance when the driver "began making evasive maneuvers." *Id.* at 278. They resumed surveillance an hour later after using the beeper to determine that the container was stationary and transmitting a signal from a cabin near Shell Lake, Wisconsin. *Ibid.*

The Court concluded that the officers' use of the beeper did not implicate the Fourth Amendment because it conveyed only facts in which the car's driver had no legitimate expectation of privacy:

> When [the driver] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Knotts, 460 U.S. at 281-282. The electronic monitoring was not a search because a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.

The Court acknowledged that the beeper enabled law enforcement officers to determine where the container of chemicals had been delivered, even though "they would not have been able to do so had they relied solely on their naked eyes." *Knotts*, 460 U.S. at 285. But the Court explained that "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise," because "[a] police car following [the vehicle] at a distance throughout his journey could have observed him leaving the public highway and arriving at [his destination]." *Ibid.*

In reaching this conclusion, the Court relied on *United States* v. *Lee*, 274 U.S. 559 (1927), in which the Court held that the nighttime use of a searchlight to observe liquor on a ship's deck did not constitute a search. The Court explained in *Lee* that the liquor was apparently sitting on deck, and authorities did not conduct an "exploration below decks or under hatches." *Id.* at 563. The Court added that the "use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Ibid.*; see also *Texas* v. *Brown*, 460 U.S. 730, 739-740 (1983) (plurality opinion) (flashlight used to inspect car not a search).

Similarly, in *Smith* v. *Maryland*, 442 U.S. 735 (1979), the Court applied the *Katz* test and concluded that the use of a pen register to record the numbers dialed on the defendant's telephone did not constitute a search. Not-

ing that a pen register records only the numbers dialed from a phone and not the contents of any conversation, *id.* at 741-742, the Court concluded that the defendant did not have a reasonable expectation of privacy in the numbers dialed.

First, the Court observed that it was doubtful that telephone users generally entertain any actual expectation of privacy in the numbers they dial, because users typically are aware that they must convey phone numbers to the telephone company, that the company has facilities for recording this information, and that it does in fact sometimes record the information for a variety of legitimate business purposes. 442 U.S. at 742-743. The Court stated that the defendant's conduct "was not and could not have been calculated to preserve the privacy of the number[s] he dialed," because he had to convey those numbers to the phone company to place the calls. *Id.* at 743.

Second, the Court concluded that even if the defendant had a subjective expectation of privacy with respect to the numbers he dialed, that expectation was not one that society was prepared to recognize as reasonable. The Court explained that "[w]hen [the defendant] used his phone, [he] voluntarily conveyed numerical information to the telephone company," and he therefore had no legitimate expectation of privacy in the phone numbers he dialed. *Smith*, 442 U.S. at 744. Noting that the defendant had conceded that he would have no reasonable expectation of privacy in the phone numbers if he had placed the calls through an operator, the Court stated that "[w]e are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate." *Id.* at 744-745.

b. In contrast, in the context of the home, when technology-assisted surveillance reveals information that has not been exposed to public view, the Court has determined that the surveillance infringes a reasonable expectation of privacy and amounts to a search. In *Kyllo* v. *United States*, 533 U.S. 27 (2001), the Court held that officers' use of thermal imaging technology to detect relative amounts of heat radiating from within a home was a Fourth Amendment search. *Id.* at 29, 40. Emphasizing the special sanctity of the home in Fourth Amendment analysis, the Court explained that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion" infringed a reasonable expectation of privacy (at least where the technology is not in "general public use"). *Id.* at 34 (internal quotation marks and citation omitted).

c. These cases reveal that, while technological intrusions into private places can infringe a legitimate expectation of privacy, when the police make observations of matters in public view, the assistance of technology does not transform the surveillance into a search. As the Court stated in *Knotts*, the suggestion that technology violates a reasonable expectation of privacy when it enhances the police's ability to acquire information in the public domain "simply has no constitutional foundation." 460 U.S. at 284.

2. Information that has been exposed to public view remains public without regard to the likelihood that any one person would acquire all of the information

This case, like *Knotts*, involves movements of a vehicle on public streets. That location information was "conveyed to anyone who wanted to look." 460 U.S. at

281. The court of appeals nevertheless concluded that respondent had a reasonable expectation of privacy in those movements because "the likelihood a stranger would observe all those movements • • • is essentially nil," Pet. App. 26a. That standard has never been used to determine whether individuals have a reasonable expectation of privacy in information that has been exposed to public view, and it would be both impractical in application and at odds with Fourth Amendment principles.

a. In *Knotts*, the Court did not analyze the likelihood that someone would follow a vehicle during a 100-mile trip from Minneapolis, Minnesota, to a cabin in Shell Lake, Wisconsin, to observe "the fact of whatever stops [were] made, and the fact of [the] final destination." *Knotts*, 460 U.S. at 281-282. Instead, the Court stated that the use of a beeper to track the vehicle "raise[d] no constitutional issues which visual surveillance would not also raise" because "[a] police car following [the vehicle] at a distance throughout [the] journey *could have* observed [the defendant] leaving the public highway and arriving at the cabin." *Id.* at 285 (emphasis added).

Similarly, in *Smith*, the Court rejected the defendant's argument that because phone companies did not usually make records of local numbers called, an individual could reasonably expect that information to be private. The Court stated that "[t]he fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference." 442 U.S. at 745. "Regardless of the phone company's election," the important distinction was that "petitioner voluntarily conveyed to [the phone company] informa-

tion that it had facilities for recording and that it was free to record." *Ibid.*

In short, this Court has never considered "the likelihood [that] a stranger" (Pet. App. 26a) would conduct surveillance of a criminal suspect in order to determine whether the government's collection of information that is in public view infringes a reasonable expectation of privacy.

b. In support of its examination of the "likelihood" that particular activities exposed to the public would actually be observed by any one person (Pet. App. 23a, 24a-26a), the court of appeals cited *California* v. *Greenwood*, 486 U.S. 35 (1988), and *Bond* v. *United States*, 529 U.S. 334 (2000), both of which involved tactile observation of items that were not visually exposed to the public. In *Greenwood*, the Court held that the defendants lacked a reasonable expectation of privacy in the contents of trash bags that they placed on the curb in front of their house. 486 U.S. at 40-41. The Court acknowledged that the defendants may have had a "subjective" expectation of privacy based on the unlikelihood that anyone would inspect their trash after they placed it on the curb "in opaque plastic bags" to be picked up by the garbage collector after a short period of time. *Id.* at 39. But that expectation, the Court held, was not "objectively reasonable." *Id.* at 40. The Court explained that once the defendants placed the bags on the curb where they were readily accessible to anyone who wanted to look inside, "the police [could not] reasonably be expected to avert their eyes from evidence of criminal activity that *could have been* observed by any member of the public." *Id.* at 41 (emphasis added). The Court attached no importance to the defendants' subjective ex-

pectation that "there was little likelihood" that anyone would inspect their trash. *Id.* at 39.

In *Bond*, the Court held that, unlike the opaque trash bags left on the curb in *Greenwood*, an opaque duffel bag that a bus passenger placed in an overhead compartment is not "exposed" to the public for the type of "physical manipulation" that a border patrol agent engaged in to investigate the bag's contents. *Bond*, 529 U.S. at 338-339. The Court in *Bond* explicitly distinguished "visual, as opposed to tactile, observation" of an item in a public place, noting that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337. The physical manipulation revealed additional, private information that had not already been exposed to the public—unlike the case with visual observation of matters that *are* exposed to public view.

The court of appeals also relied (Pet. App. 23a-24a) on this Court's flyover cases, see *California* v. *Ciraolo*, 476 U.S. 207 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989), in support of asking whether visual observation was in fact likely to occur. That reliance is misplaced. *Ciraolo* and *Riley* involved visual inspections of private areas (the curtilage of homes), not public movements. In both cases, the Court acknowledged that although the defendants had exhibited actual expectations of privacy in their backyards, those expectations were not reasonable "[i]n an age where private and commercial flight in the public airways is routine." *Ciraolo*, 476 U.S. at 215; see *Riley*, 488 U.S. at 450 (plurality opinion).[2] The

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[2] Justice O'Connor's concurrence in *Riley* clarified that she believed that the defendant's backyard had been "exposed" to the public not because it was possible or legal for commercial planes to fly over the

Court's analysis in those cases was used to determine whether something ordinarily private was sufficiently "exposed" to the public to make an expectation of privacy in that area unreasonable. In contrast, the court of appeals used the unlikelihood of prolonged observation of a car's movements on public roads to determine that activities "exposed" to the public could reasonably be expected to remain private. But this Court has never conducted that type of inquiry for matters—like a vehicle's movements on public roads—that have clearly been exposed to public view.

c. In addition to lacking any foundation in this Court's Fourth Amendment cases, the court of appeals' inquiry into the "likelihood" that publicly observable matters would actually be observed by non-law-enforcement personnel is unworkable. In evaluating whether use of a tracking device would amount to a search, and thus, in the court of appeals' view, require a warrant, officers would have to assess how likely it would be that a stranger would observe a suspect's movements for any given period of time. That inquiry gives no realistic guidance to officers in the field. And it overlooks that officers could not be expected to know at the outset whether following the vehicle will produce useful information never, quickly, or only over a long period of time.

This Court has refused to require officers to make such predictions in other Fourth Amendment contexts precisely because of the impracticality of doing so. See, *e.g.*, *Kentucky* v. *King*, 131 S. Ct. 1849, 1859 (2011) (rejecting forseeability test to determine whether officers may enter a home based on exigent circumstances that

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area, but because the defendant did not rebut the reasonable inference that overflight was common. 488 U.S. at 454-455.

arose in response to lawful investigative activities because it would require officers to "quantify the degree of predictability" about how particular occupants would react to police inquiry); *United States* v. *Robinson*, 414 U.S. 218, 235 (1973) (rejecting rule that would require case-by-case adjudication of whether search incident to lawful arrest was justified based on "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found").

d. In the context of information that is in public view, the court of appeals' "likelihood" approach is also not a reliable gauge of a person's reasonable expectation of privacy. Although it may be unlikely that a stranger would follow someone for an extended period of time, a stranger certainly could observe the "places, people, amusements, and chores" that make up another person's routine. See Pet. App. 26a-27a. Respondent could not have kept private the fact that he frequently drove his Jeep to the Fort Washington stash house, and neighbors certainly could have noticed respondent's regular visits.

3. The reasonable expectation of privacy in activities exposed to public view does not depend on the total quantity of information collected

The other basis for the court of appeals' conclusion that GPS surveillance infringed a reasonable expectation of privacy was that the investigation became a search when the officers aggregated sufficient public information to create a "mosaic" of respondent's activities. Pet. App. 27a-35a. Without defining how long GPS surveillance of public movements may occur before the surveillance reveals enough information to become a search, the court of appeals stated that by tracking re-

spondent's vehicle for 28 days, the officers intruded on a reasonable expectation of privacy by "discovering the totality and pattern of [respondent's] movements from place to place," *id.* at 21a-22a, which "reveal[ed] far more than the individual movements," *id.* at 29a. That approach finds no support in Fourth Amendment law, and it would pose a myriad of problems for courts and officers.

a. *Knotts* was not based on the length of time the beeper was in place or the quantity of information it transmitted to police. The Court's Fourth Amendment holding—that no search took place—rested on the principle that "when [the driver] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." *Knotts*, 460 U.S. at 281-282. Because those actions were exposed to public view, the driver had no reasonable expectation of privacy in the location information the beeper conveyed. *Id.* at 281-282, 284-285.

Although the facts of *Knotts* did involve police monitoring of a "discrete journey" (Pet. App. 17a) on public roads with the assistance of electronic surveillance, the Court applied the same Fourth Amendment principles to prolonged electronic tracking in *United States* v. *Karo*, 468 U.S. 705, 715 (1984). In *Karo*, agents placed a tracking device in a can of ether and left the device in place for five months as the can was transported between different locations. *Id.* at 708-710. The Court held that certain transmissions from the beeper during that prolonged period—*i.e.*, those that revealed information about private spaces—could not be used to establish

probable cause in an application for a warrant to search a residence. *Id.* at 714-718. But the Court's holding on that point did not depend upon the duration of the electronic tracking. Although the court of appeals in *Karo* had distinguished *Knotts* on the ground that "[t]he *Knotts* case involved surveillance over only a few days; monitoring in [this] case took place over five months," *United States* v. *Karo*, 710 F.2d 1433, 1439 (10th Cir. 1983), rev'd, 468 U.S. 705 (1984), the Court concluded that the remaining evidence, including "months-long tracking" of the ether can through "visual and beeper surveillance," established probable cause supporting issuance of the warrant. *Karo*, 468 U.S. at 719-720. The Court expressed no concern about the prolonged monitoring.

As Chief Judge Sentelle stated in his dissent from the denial of rehearing en banc, "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "the sum of an infinite number of zero-value parts is also zero." Pet. App. 47a-48a. Nothing in this Court's Fourth Amendment cases supports the court of appeals' "mosaic" theory that a person can maintain a reasonable expectation of privacy in the totality of his public movements, each of which is "convey[ed] to anyone who want[s] to look." *Knotts*, 460 U.S. at 281-282.

b. In support of its unprecedented "mosaic" approach, the court of appeals stated that this Court has "implicitly recognized" (Pet. App. 28a) a distinction between a whole and the sum of its parts for purposes of determining whether information has been exposed to the public. The court cited *United States Department of Justice* v. *Reporters Committee for Freedom of the*

Press, 489 U.S. 749 (1989), and *Smith* v. *Maryland*, *supra*, neither of which offers any support for the court's decision. Pet. App. 27a-29a. *Reporters Committee for Freedom of the Press* is not a Fourth Amendment decision examining whether the government's acquisition of publicly available facts constituted a search. Rather, it is a Freedom of Information Act (FOIA) case addressing a person's request to obtain information about an individual from the government. After examining statutory restrictions on the dissemination of "rap sheets" and other "compiled computerized information," the Court held that an individual has a privacy interest within the meaning of FOIA in his rap sheet, which compiled "scattered bits" of public information, "not freely available * * * either to the officials who have access to the underlying files or to the general public." 489 U.S. at 766, 767-771. Its analysis does not bear on, let alone resolve, the question of whether an individual who exposes his or her movements to the public retains a reasonable expectation of privacy in the sum of those movements for purposes of the Fourth Amendment.

The court of appeals also stated (Pet. App. 28a) that, in *Smith*, this Court considered "whether [a person] expects all the numbers he dials to be compiled in a list" in determining whether a person has a reasonable expectation of privacy in the phone numbers he dials. That is incorrect. The Court noted in *Smith* that a person "see[s] a list of their * * * calls on their monthly bills" in support of its conclusion that individuals would not "in general entertain any actual expectation of privacy in the numbers they dial," and thus would lack even a *subjective* expectation of privacy. 442 U.S. at 742. The Court's ultimate conclusion was that any subjective ex-

pectation of privacy a person has in the phone numbers he dials is objectively unreasonable, because when a person uses his phone, he "voluntarily convey[s] numerical information to the telephone company," thereby "expos[ing] th[e] information" to a third party. *Id.* at 744.

Far from supporting the court of appeals' mosaic approach, *Smith* demonstrates that the Court has consistently applied the *Katz* framework notwithstanding concerns that the aggregated result (revealing a list of all the phone numbers a person has dialed), could "reveal the most intimate details of a person's life." *Smith*, 442 U.S. at 748 (Stewart, J., dissenting).

c. As with the court of appeals' "likelihood" analysis, see pp. 25-26, *supra*, its "mosaic" rationale is unworkable. The court's opinion gives no guidance to law enforcement officers about how long a device may remain in place before the monitoring becomes too "prolonged" because it reveals a pattern. Perhaps the court of appeals would find use of a GPS device for a few hours (or a few days) acceptable because it would yield only a few tiles of a mosaic. But the court's opinion offers no workable standard for law enforcement officers—or courts—to determine when extended use of a GPS device becomes a search. See Pet. App. 48a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem"); see also *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amend-

ment balance is not well served by standards requiring sensitive, case-by-case determinations * * * lest every discretionary judgment in the field be converted into an occasion for constitutional review."). Indeed, under the court of appeals' approach, the court seemingly should have identified the precise point at which the use of the GPS device became a search and excluded only GPS data gathered thereafter. Instead, the court considered all of the GPS information to be tainted when conducting its harmless-error analysis, Pet. App. 39a-41a, thus apparently treating even the early (pre-mosaic) stages of the monitoring as a search. But officers' conduct that was lawful at the time should not retroactively be deemed a search because of what they learned later.[3]

The court of appeals' "mosaic" theory also has the potential to destabilize Fourth Amendment law and to raise questions about a variety of common law-enforcement practices. Protracted use of pen registers, repeated trash pulls, aggregation of financial data, and prolonged visual surveillance can all produce an immense amount of information about a person's private life—that is often the goal. Each of those practices has been held not to be a Fourth Amendment search. See

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[3] For example, in *United States* v. *Cuevas-Perez*, 640 F.3d 272 (2011), petition for cert. pending, No. 11-93 (filed July 20, 2011), the Seventh Circuit held that the 60-hour GPS surveillance of a vehicle as it traveled from Arizona to Illinois was not a search, *id.* at 272-273 (opinion of Cudahy, J.), and in *United States* v. *Hernandez*, No. 10-10695, 2011 WL 2750914 (July 18, 2011), the Fifth Circuit concluded that the two-day GPS surveillance of a vehicle was not a search, *id.* at *1. Under the court of appeals' mosaic approach, even the initial few days of surveillance in those cases would have been deemed a search if the GPS device had remained in place for a longer period of time, but the court of appeals gave no guidance for where the line should be drawn.

Smith, 442 U.S. at 745-746; *Greenwood*, 486 U.S. at 44-45; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Karo*, 468 U.S. at 721. Multiple non-search investigatory techniques do not become a search when the information obtained from them is aggregated. But under the court of appeals' theory, these non-search techniques could be transformed into a search when used for some undefined period of time or in combination. The court of appeals' mosaic theory thus has limitless potential to require courts to draw impossible lines between the moderate degree of observation permitted under the court's approach, and the excessive or prolonged degree that becomes a search.

B. The Court Should Not Depart From Its Well-Established Reasonable-Expectation-Of-Privacy Framework To Protect Against Theoretical Future Misuses Of Technology

According to the court of appeals, this Court in *Knotts* "reserved the question whether a warrant would be required in a case involving 'twenty-four hour surveillance.'" Pet. App. 17a-18a. The court of appeals misconstrued this statement from *Knotts*, which addressed a concern raised by the defendant in that case about future misuses of beeper technology. Far from reserving the question of whether police could conduct prolonged electronic tracking of the public movements of a suspected cocaine dealer's vehicle without a warrant, the Court made clear in *Knotts* that its established reasonable-expectation-of-privacy framework should not be expanded to protect against hypothetical misuses of technology that do not occur in reality. If prophylactic protections beyond those provided by the Fourth Amendment are deemed warranted, Congress has the ability to provide those protections.

1. In *Knotts*, the defendant argued that the Court should "remain mindful" that if it were to conclude that using an electronic tracking device to monitor an object's public movements was not a search, then "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision," and "[a]ny person or residence could be monitored at any time and for any length of time." Resp. Br. at 9-10, *Knotts*, *supra* (No. 81-1802). In addressing this concern, the Court noted that the defendant "d[id] not actually quarrel with [the Court's reasonable expectation of privacy] analysis." *Knotts*, 460 U.S. at 283. Instead, the court pointed out that the defendant's concern about government misuse of electronic tracking technology was not occurring in reality, and the Court explained that "if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 283-284.

Members of this Court have used the term "dragnet" to refer to mass or widespread searches or seizures that are conducted without individualized suspicion. See, *e.g.*, *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in *Davis* v. *Mississippi*, 394 U.S. 721 (1969)); *Berger* v. *New York*, 388 U.S. 41, 65 (1967) (Douglas, J., concurring) (wiretaps covering all conversations and participants). The officers in this case were not engaged in "dragnet" surveillance; they used the mobile tracking device to monitor the movements of a single vehicle driven by a person suspected of large-scale cocaine trafficking. See pp. 2-4, *supra* (noting that officers obtained evidence linking respondent to his co-conspirators and

to suspected drug stash locations through visual surveillance, a pole camera, a pen register, and a Title III wire intercept). Notably, when the Court in *Karo* considered prolonged electronic monitoring of the movements of an item carried in a vehicle, it did not hesitate to hold that the "months-long tracking" of the item through "visual and beeper surveillance" constituted legitimate evidence under *Knotts* that properly formed the basis for a warrant. 468 U.S. at 719, 721.

The court of appeals pointed to no evidence that law enforcement officers engage in GPS monitoring of vehicles without any suspicion of criminal activity. Any such general monitoring would ordinarily prove to be an extraordinarily inefficient and unproductive use of law enforcement resources. Officers would have to sift through and analyze voluminous lists of geographic coordinates (see, *e.g.*, J.A. 223-225), hoping to find some indication of criminal activity. As in *Knotts*, "the fact is that the 'reality hardly suggests abuse.'" 460 U.S. at 283-284 (quoting *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978)). The decision whether to apply "different constitutional principles" to hypothetical programs of mass, suspicionless surveillance can await resolution if such programs ever occur.

2. Under current constitutional principles, the government's investigation in this case did not amount to a search. If prophylactic measures are deemed necessary or appropriate to guard against the capabilities of technology to collect information that has been exposed to public view, that protection should be provided through the legislative process, not through distortion of Fourth Amendment doctrine.

The legislature has historically played that role. For example, in *United States* v. *Miller*, *supra*, the Court

held that the government's acquisition of copies of an individual's bank records by means of a subpoena duces tecum served on the bank was not a Fourth Amendment search. 425 U.S. at 443. After the Court's decision in *Miller*, Congress enacted the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, tit. XI, 92 Stat. 3697 *et seq.*, in order "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R. Rep. No. 1383, 95th Cong., 2d Sess. 33 (1978). The House Report explicitly stated that the Act was meant to supplement the Fourth Amendment, noting that "while the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution." *Id.* at 34.

Similarly, after the Court held in *Smith* that the use of a pen register was not a Fourth Amendment search, Congress imposed limits on the government's ability to obtain pen register data through the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301(a), 100 Stat. 1868. And a few state legislatures have already enacted laws requiring a court order before installing and using a mobile tracking device. *E.g.*, Minn. Stat. Ann. § 626A.35 (West 2009); Haw. Rev. Stat. Ann. § 803-44.7 (LexisNexis 2007).[4]

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[4] The court of appeals stated that Utah, Florida, South Carolina, Oklahoma, and Pennsylvania also prohibit the use of "electronic monitoring devices" without a warrant. Pet. App. 33a-34a. Three of those States *specifically exclude* communications from a "mobile tracking device" from the definition of "electronic monitoring device." See Utah Code Ann. § 77-23a-3 (2008); Fla. Stat. Ann. § 934.02 (West 2011); Okla. Stat. Ann. tit. 13, § 176.2 (West 2011). And although the court of appeals identified statutes in each of those States setting forth

The Fourth Amendment does not require police to obtain a warrant before they may observe activities that are in public view. The Court should not depart from its established reasonable-expectation-of-privacy framework to account for hypothetical misuse of technology that does not occur in reality.

C. Respondent Had No Reasonable Expectation Of Privacy In The Movements Of His Vehicle On Public Streets Because That Information Was Exposed To Public View

Applying the analytical framework of this Court's cases, the use of a GPS device to track the public move-

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a procedure for obtaining a tracking-device warrant, see Pet. App. 33a-34a, those statutes do not require that police obtain such a warrant. Similarly, a federal statute authorizes judges to issue tracking-device warrants, see 18 U.S.C. 3117, and the Federal Rules of Criminal Procedure include procedures for obtaining tracking-device warrants, see Fed. R. Crim. P. 41(e)(2)(C) and (f)(2). But those provisions do not prohibit the use of a tracking device without a warrant. The legislative history of Section 3117 makes clear Congress's understanding that, under the Court's decision in *Knotts*, a warrant is not required for either the installation or use of a mobile tracking device. See H.R. Rep. No. 647, 99th Cong., 2d Sess. 60 (1986) (noting Court's holding in *Knotts* that warrantless "installation of a beeper on a container to follow on a public roadway does not violate the Fourth Amendment"); see also Fed. R. Crim. P. 41(d) advisory committee's note (2006 Amendments) (stating that Rule 41 does not specify a standard for installation of a tracking device "or hold that [tracking device] warrants may only issue upon probable cause").

In any event, contrary to the court of appeals' apparent view (Pet. App. 34a), the existence of those state laws does not inform the existence of a legitimate expectation of privacy under the Fourth Amendment in the public movements of a vehicle. See *Virginia* v. *Moore*, 553 U.S. 164, 173 (2008) ("[W]hen States go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same."); *Whren* v. *United States*, 517 U.S. 806, 815 (1996) (Fourth Amendment protections do not turn on local law enforcement practices, even those set by rule).

ments of respondent's vehicle did not constitute a search. The GPS device used in this case conveyed the same type of information that the beeper conveyed in *Knotts*—the approximate location of the object to which it was attached. See J.A. 79-81. As in *Knotts*, respondent had "no reasonable expectation of privacy in his movements from one place to another" as he traveled on public roads. 460 U.S. at 281. Unlike private areas adjacent to homes, see *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 450-451, or items that are carried in public in opaque bags, see *Bond*, 529 U.S. at 338-339, the movements of a vehicle on public streets have unquestionably been exposed to public view. See *Knotts*, 460 U.S. at 285; see also *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) ("A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."). And as this Court has long held, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

The GPS device assisted the officers in understanding respondent's role in a large-scale cocaine-trafficking conspiracy, including his repeated visits to a suspected stash house in Fort Washington. J.A. 122-124, 163-166. Because respondent drove to the stash house on public roads where police, neighbors, or other members of the public could observe him, he may not claim a constitutionally protected expectation of privacy in those movements. See *Knotts*, 460 U.S. at 281-282 (driver "voluntarily conveyed [his movements] to anyone who wanted to look"). Use of the GPS device to monitor the movements of respondent's vehicle on public roads was not a Fourth Amendment search, and evidence obtained from the GPS device was properly admitted at trial to prove

respondent's participation in the cocaine-trafficking conspiracy.

II. ATTACHING THE GPS TRACKING DEVICE TO RESPONDENT'S VEHICLE WAS NOT A SEARCH OR SEIZURE UNDER THE FOURTH AMENDMENT

Although the court of appeals did not address the question, respondent also contends that the attachment of the GPS device to his vehicle, as distinct from the use of the device to monitor the vehicle's public movements, violated the Fourth Amendment. It did not. Respondent had no reasonable expectation of privacy in the exterior of his vehicle, and attachment of the GPS device therefore did not constitute a search. Nor did the attachment constitute a seizure, because it did not meaningfully interfere with respondent's possessory interest in the vehicle.

A. Attaching The Tracking Device To Respondent's Vehicle Was Not A Search Because Respondent Had No Reasonable Expectation Of Privacy In The Exterior Of The Vehicle

As explained above, a search within the meaning of the Fourth Amendment occurs only where a "legitimate expectation of privacy * * * has been invaded by government action." *Knotts*, 460 U.S. at 280. Respondent does not contend that the officers searched any interior compartment of his vehicle, or that agents physically moved or altered any part of the vehicle. Accordingly, the question before the Court is whether respondent had a reasonable expectation of privacy in the exterior of the vehicle. The answer is no.

1. This Court held in *New York* v. *Class*, 475 U.S. 106 (1986), that individuals have no reasonable expectation of privacy in the exterior of a vehicle because "[t]he

exterior of a car * * * is thrust into the public eye." *Id.* at 114. In *Class*, a police officer inspected the outside of a vehicle while conducting a traffic stop and also reached inside the vehicle to move papers that obscured the vehicle identification (VIN) number on the dashboard. *Id.* at 107. The Court held that even reaching into the vehicle to move the papers did not amount to a search, because "[t]he VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment." *Id.* at 114. Furthermore, parking a vehicle in a public lot does nothing to "bar the public from viewing" the car's exterior. *Oliver*, 466 U.S. at 179; see *Greenwood*, 486 U.S. at 40 ("It is common knowledge that [objects] on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.")

Consistent with the principle announced in *Class*, courts have held that police do not conduct a search when they inspect a car's doors, wheels, or undercarriage. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion) (noting that officers examined a car's wheel and took paint scrapings from exterior of a vehicle left in a public parking lot, and stating "we fail to comprehend what expectation of privacy was infringed"); *United States* v. *Rascon-Ortiz*, 994 F.2d 749, 750-752, 754-755 (10th Cir. 1993) (examination of car's undercarriage not a search); *United States* v. *Price*, 869 F.2d 801, 803-804 (5th Cir. 1989) (same); see also, *e.g.*, *United States* v. *George*, 971 F.2d 1113, 1120-1121 (4th Cir. 1992) (examination of car's tires not a search); see generally 1 Wayne R. LaFave, *Search and Seizure* § 2.5(c), at 653 (4th ed. 2004) (examination of exterior of a vehicle is not a Fourth Amendment search absent some physical intrusion into the vehicle).

Of course, the officers in this case did more than conduct a visual inspection of respondent's vehicle while it was parked in a public parking lot; they attached a mobile tracking device to the vehicle's exterior. But the act of attaching the device to the vehicle's exterior revealed no information in which respondent had a reasonable expectation of privacy. The Court rejected this argument in *Karo*, holding that the installation of a beeper in the canister that came into the defendant's possession was not a search because the installation, as opposed to the monitoring of the beeper, "conveyed no information that [the defendant] wished to keep private, for it conveyed no information at all." 468 U.S. at 712.

Respondent contends (Br. in Opp. 33) that attaching a tracking device to his vehicle is comparable to an exploratory squeezing of the outer surface of a passenger's personal luggage, which this Court concluded in *Bond* amounted to a search. See 529 U.S. at 339. But the officer's exploratory manipulation of the duffel bag in *Bond* was a search because the tactile observation revealed information about the contents of the luggage, in which the owner had a reasonable expectation of privacy. *Id.* at 338-339. In contrast, attachment of the tracking device to the exterior of respondent's vehicle revealed no information to the officers. See *Karo*, 468 U.S. at 712. Because the attachment did not reveal any information in which respondent had a reasonable expectation of privacy, it was not a Fourth Amendment search.

2. As the Court acknowledged in *Karo*, the placement of an electronic tracking device on an object "create[s] a *potential* for an invasion of privacy" in that the device could subsequently be used to observe information about a private area. 468 U.S. at 712; *id.* at 714 (holding that transmissions from beeper that revealed

information about private areas could not be used to establish probable cause in an application for a warrant to search a residence). But as the Court explained in *Karo*, "we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *Id.* at 712. "A holding to that effect," the Court explained, "would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on." *Ibid.* The Court concluded in *Karo* that any impairment of privacy interests that may result from attaching a tracking device to an object is "occasioned by the monitoring of the [device]," not by the installation. *Id.* at 713.

Since *Class* and *Karo* were decided, every court of appeals to consider the issue has concluded that affixing an electronic tracking device to the exterior of a vehicle parked in a public area is not a search within the meaning of the Fourth Amendment. See *United States* v. *Hernandez*, No. 10-10695, 2011 WL 2750914, at *2 n.4 (5th Cir. July 18, 2011); *United States* v. *Cuevas-Perez*, 640 F.3d 272, 274 & n.2 (7th Cir. 2011), petition for cert. pending, No. 11-93 (filed July 20, 2011) (citing *United States* v. *Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007)); *United States* v. *McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999), cert. denied, 528 U.S. 1177 (2000). The Court should reach the same result here.

B. Attaching The Tracking Device To Respondent's Vehicle Was Not A Seizure Because The Device Did Not Meaningfully Interfere With Respondent's Possessory Interests In The Vehicle

A "seizure of property" within the meaning of the Fourth Amendment occurs only where "there is some

meaningful interference with an individual's possessory interests in that property." *Karo*, 468 U.S. at 712 (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). In *Karo*, the Court explained that "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated," because "an actual trespass is neither necessary nor sufficient to establish a [seizure]." *Id.* at 712-713. The Court held in *Karo* that installation of a beeper in the container of chemicals was not a "seizure," because "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way." *Id.* at 712.

Several courts of appeals have considered whether installation of a GPS tracking device on the exterior of a vehicle amounted to a Fourth Amendment seizure, and each court has concluded that it did not. In *United States* v. *Garcia*, *supra*, the Seventh Circuit explained that attachment of a GPS device to the defendant's car "did not 'seize' the car in any intelligible sense of the word," because the device "did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, [and] did not * * * alter the car's appearance." 474 F.3d at 996; see also *Hernandez*, 2011 WL 2750914, at *2 n.4 (rejecting claim that placement of magnetized GPS tracking device on undercarriage of truck was a Fourth Amendment seizure); *McIver*, 186 F.3d at 1127 (rejecting similar claim where there was no evidence that the device deprived the owner "of dominion and control" over the vehicle or "caused any damage to the electronic components of the vehicle"); *Foltz* v. *Commonwealth*, 698

S.E.2d 281, 285-292 (Va. Ct. App. 2010) (rejecting same claim), aff'd on other grounds, 706 S.E.2d 914 (Va. Ct. App. 2011) (en banc); cf. *Commonwealth* v. *Connolly*, 913 N.E.2d 356, 369 (Mass. 2009) (holding that installation of GPS device was a seizure under state constitution where police installed device in the engine compartment so that it could draw power from the vehicle's electrical system).

Respondent has not identified any way in which placing a tracking device on the exterior of his vehicle interfered with his possessory interests, and nothing in the record suggests that the device prevented respondent from driving the vehicle, affected its "driving qualities," drew power from the vehicle, or occupied space that could have been used for passengers or packages. Nor does respondent contend that the tracking device impaired the value of his vehicle by causing any physical damage or alteration. As in *Karo*, "[a]t most, there was a technical trespass on the space occupied by the [device]." 468 U.S. at 712. That physical act is no more a seizure than is marking a vehicle's tire with a white chalk "X" so that an officer enforcing parking laws may later determine how long the vehicle has been parked in a particular spot. Although the chalk mark is an unwanted addition to the vehicle—and is also an addition used to track the vehicle's location—the chalk mark does not diminish the owner's use or control over his vehicle. The same is true of the mobile tracking device placed on respondent's vehicle.

The only authority that respondent has identified in support of his argument that attachment of the tracking device to his vehicle was a Fourth Amendment seizure (see Resp. C.A. Br. 55 n.202; Br. in Opp. 33) is Judge Kleinfeld's concurring opinion in *United States* v.

McIver, *supra*. In Judge Kleinfeld's view, attachment of a tracking device interfered with the vehicle owner's possessory interests because radio signals emitted from the device could have interfered with the vehicle's operation, or the device could have short-circuited and caused a fire. 186 F.3d at 1134. Judge Kleinfeld also stated that the attachment interfered with the owner's "possessory interest * * * in excluding individuals from performing mechanical work on his vehicle or altering it without his consent." *Id.* at 1133.[5]

The hypothetical concerns outlined in Judge Kleinfeld's *McIver* concurrence are insufficient to demonstrate that a seizure occurred in this case. A seizure turns on more than speculative possibilities; to prove that a seizure occurred, the defendant must point to a particular way in which "there [wa]s some meaningful interference with [his] possessory interests in [his] property." *Karo*, 468 U.S. at 712. Respondent has never claimed that the tracking device interfered with the vehicle's electrical system. The tracking device used a standard GPS receiver, of the same type regularly used in cell phones and navigation systems without affecting the operation of automobiles. See J.A. 79-82. Likewise, respondent has never made any claim that the mobile tracking device posed any risk of a short circuit. Nor did respondent make any claim below that the tracking device was attached in an intrusive way, requiring officers to alter mechanical parts of the vehicle. Having failed to develop those factual claims below, respondent

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[5] Judge Kleinfeld's opinion did not carry the day. The majority opinion in *McIver* held that the tracking devices did not "deprive [the defendant] of dominion or control" over his vehicle or "cause[] any damage to the electronic components of the vehicle," and thus did not meaningfully interfere with any possessory interest. 186 F.3d at 1127.

cannot now rely on speculation and hypotheticals to demonstrate that his vehicle was "seized" within the meaning of the Fourth Amendment.

Respondent's seizure claim rests on the assertion that the GPS device was used to collect location information; he has not maintained that attaching the device interfered with his possessory interests. Resp. C.A. Reply Br. 17 ("[T]he Government's warrantless acquisition of recorded movement/location information is a seizure."); *id.* at 23 ("The use of GPS is akin to a seizure."); see also Resp. C.A. App. 418 (respondent's suppression motion grounding a "seizure" argument in his "expectation of privacy in his Jeep," not interference with possessory interests). The placement of the device on the vehicle's exterior did not meaningfully interfere with respondent's possessory interests, and it is not transformed into a seizure when the device is used to track the vehicle's movements.[6]

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[6] In his dissent from the denial of rehearing en banc, Judge Kavanaugh stated that the Court's opinion in *Silverman* v. *United States*, 365 U.S. 505 (1961), might be relevant to the question whether the installation of a GPS device on respondent's vehicle implicated the Fourth Amendment. Pet. App. 50a-52a. *Silverman*, however, relied on a physical-encroachment principle that no longer states the governing test under the Fourth Amendment. In *Silverman*, officers listened to conversations occurring inside of a row house using a "spike mike" that they inserted into the baseboard of the adjoining house until it made contact with the defendants' heating duct. *Id.* at 506-507. The Court concluded that this technique implicated the Fourth Amendment, because "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by [the defendants]." *Id.* at 509. The Court distinguished that surveillance technique from techniques that had been held not to implicate the Fourth Amendment—the use of a detectaphone against the wall of an adjoining office in *Goldman* v. *United States*, 316 U.S. 129 (1942), and the use of a microphone on an undercover officer in *On Lee* v. *United States*, 343

III. EVEN IF USING THE GPS TRACKING DEVICE TO MONITOR THE PUBLIC MOVEMENTS OF RESPONDENT'S VEHICLE OR ATTACHING THE DEVICE TO THE VEHICLE'S EXTERIOR WAS A SEARCH OR SEIZURE, IT WAS REASONABLE UNDER THE FOURTH AMENDMENT

Even assuming that the use or attachment of the mobile tracking device was a search or seizure, respondent's Fourth Amendment rights were not violated. Not every Fourth Amendment intrusion requires a warrant or probable cause; to the contrary, the general test is one of reasonableness. Because installation and use of a GPS device is, at most, only minimally intrusive, and because GPS surveillance is a critically important law enforcement tool that often may be most important in the inception of an investigation when probable cause is lacking, the Fourth Amendment balancing test should

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U.S. 747 (1952)—on the ground that the eavesdropping in those cases "had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area." *Silverman*, 365 U.S. at 510. In *Katz*, however, the Court made clear that the underpinnings of cases like *Goldman* and *On Lee* "have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353. The Court explained that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure,' but it instead turns upon whether the government's surveillance "violated the privacy upon which [the defendant] justifiably relied." *Ibid.* In any event, temporarily attaching a nonintrusive GPS device to the exterior of respondent's vehicle and using the device did not penetrate or occupy any "constitutionally protected area"; it made only ephemeral contact with the exterior of respondent's vehicle.

not require probable cause or a warrant as a prerequisite to the attachment and use of a GPS tracking device.[7]

1. This Court has stated that under its "general Fourth Amendment approach," it "examine[s] the totality of the circumstances" to determine whether a search or seizure is reasonable under the Fourth Amendment." *Samson* v. *California*, 547 U.S. 843, 848 (2006) (internal quotation marks and citation omitted). Under that analysis, the reasonableness of a search or seizure is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Ibid.*

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court has identified various law enforcement actions that qualify as Fourth Amendment searches or seizures, but that may nevertheless be conducted without a warrant or probable cause. In *Terry*, the Court noted that an officer who stops a person on the street and frisks him for weapons has effected a "seizure" and "search" within the meaning of the Fourth Amendment. But because "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security,"

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[7] Even though the government did not raise this argument below, in the event that the Court holds that the use or installation of GPS technology is a search or seizure—or chooses not to reach that question—it can uphold the validity of the police action in this case based on reasonable suspicion to use the GPS device. The Court followed a similar course in *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001), in which the Court upheld the search of a probationer's house on grounds of reasonable suspicion, even though the court of appeals had not addressed a reasonable-suspicion argument, and the government's argument in favor of the search rested on the broader ground of consent to a search as a condition of probation.

id. at 19, the Court concluded that a stop and frisk, which is considerably less intrusive than a full-blown arrest and search of a person, may be undertaken on less than probable cause, although the facts known to the officer must at least support a reasonable inference of unlawful activity and, for the frisk, that the person may be armed, *id.* at 29.

In subsequent cases, the Court has continued to recognize various types of police activities that amount to searches or seizures, but need not be justified by a warrant or probable cause. See, *e.g.*, *Samson*, 547 U.S. at 847 (individualized suspicion not required for search of parolee's home or person); *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001) (upholding search of probationer's home based on reasonable suspicion); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341-342 (1985) (upholding search of public school student based on reasonable suspicion); *United States* v. *Place*, 462 U.S. 696, 706 (1983) (upholding seizure of traveler's luggage on reasonable suspicion that it contains narcotics); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976) (upholding suspicionless vehicle stops at fixed border patrol checkpoints).

2. Applying the Court's balancing test to GPS tracking of vehicles on public roads, neither a warrant nor probable cause should be required. The privacy interest, if any, is minimal. A GPS tracking device does not conduct either a visual or aural search of the item to which it is attached. See *Smith*, 442 U.S. at 741-742 (noting that pen register records only the numbers dialed from a phone and not the contents of any conversation). The device does not reveal who is driving the car, what the occupants are doing, or what they do when they arrive at their destination; it provides information

only about the vehicle's location. And the information that the tracking device reveals about the vehicle's location could also be obtained (albeit less efficiently) by means of visual surveillance. This Court "has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); see also *Cardwell*, 417 U.S. at 590; *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Accordingly, GPS monitoring does not require the protection of a warrant. The intrusion occasioned by attachment of a tracking device on a vehicle is also minimal. Attachment is much less intrusive than the typical stop and frisk. Nothing from the vehicle is removed, nor is any enclosed area entered.

On the other side of the ledger, the minimal protection of an individual's privacy, if any, resulting from the necessity of obtaining a warrant before using a tracking device on a vehicle would come at great expense to law enforcement investigations. If a warrant and probable cause were required before officers could attach a GPS device to a vehicle, the court of appeals' decision would seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, and other crimes. Law enforcement officers could not use GPS devices to gather information to *establish* probable cause, which is often the most productive use of such devices.

If a Fourth Amendment balancing test were held applicable here, no violation would exist on the facts of this case. As determined by the district judge who issued the tracking-device warrant, the officers had rea-

sonable suspicion, and indeed probable cause, to believe that respondent was a leader in a large-scale cocaine distribution conspiracy. See J.A. 21-34; Pet. App. 38a-39a; Resp. C.A. App. 350-412. Because the substantial law enforcement interest in investigating such an offense outweighs the very limited Fourth Amendment privacy interests that are assertedly implicated by GPS surveillance, that particularized suspicion was more than adequate to support the warrantless attachment of a mobile tracking device to respondent's vehicle and the subsequent use of the device to monitor the vehicle's movements on public roads.[8]

---

[8] In *Karo*, the Court required a warrant for the beeper surveillance in that case, rejecting the government's argument that "the beeper constitutes only a miniscule intrusion on protected privacy interests." 468 U.S. at 717. But *Karo* does not suggest the need for a warrant here, for at least two reasons. First, *Karo* involved a search inside a private residence, which lies at the core of Fourth Amendment protection, while this case involves travel on public roadways, which lies (at best) on the periphery. Second, the Court left open in *Karo* whether reasonable suspicion would be sufficient for beeper monitoring, see *id.* at 718 n.5, which casts doubt on any categorical warrant requirement for electronic monitoring of location. If a warrant would always be required, so would probable cause, because the Fourth Amendment permits issuance of a warrant only on probable cause. See *Griffin* v. *Wisconsin*, 483 U.S. 868, 877-878 (1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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AND
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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTOINE JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the warrantless use of a GPS tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment.

2. Whether the government violated respondent's Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent.

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STATEMENT OF THE CASE

I. A. In 1978, the U.S. Department of Defense launched the Navigational Satellite Timing and Ranging Global Positioning System, or GPS, for the U.S. military's use. *See* Renée M. Hutchins, *Tied Up in* Knotts? *GPS Technology and the Fourth Amendment*, 55 UCLA L. Rev. 409, 414 (2007) (citing Def. Sci. Bd. Task Force, Dep't of Def., *The Future of the Global Position System* 4, 25-26 (2005)) (hereinafter Hutchins). The system operates through 25 government-owned satellites orbiting the earth, each of which "continuously transmits the position and orbital velocity of every satellite in the system." *Id.* at 415. A GPS device "'listens' to the transmissions of the four closest satellites," and, through a process known as trilateration, "determines its precise location on earth." *Id.* at 415-17.

GPS devices produce an accurate, continuous, and three-dimensional digital record of their position and velocity over any period of time—as well as that of any person or object carrying them. *See* Muhammad U. Iqbal & Samsung Lim, *Privacy Implications of Automated GPS Tracking and Profiling*, IEEE Tech. & Soc'y Magazine (2010), *available at* http://www.gmat.unsw.edu.au/snap/publications/usman&lim2007c.pdf. These data can be communicated to a remote computer through a cellphone connection and translated onto an interactive map." *Id.* Even without the application of additional software, a GPS device is "accurate within 50 to 100 feet." Pet. Br. 3-4. With additional software, the FBI can identify the most likely exact longitude, latitude, and address "on the mapping system," JA 80-81, with accurate "posi-

tioning to within a few centimeters" or even "millimeter[s]," *see* "GPS Accuracy," http://www.gps.gov/systems/gps/performance/accuracy (last visited Sept. 25, 2011). And the technology is rapidly improving. *See* Hutchins, *supra*, at 421.

B. Through the first two decades of the system's existence, only the military could access accurate encrypted GPS signals; unencrypted civilian signals were "intentionally riddled with random errors" to "reduce the accuracy of the information transmitted for civilian purposes." *Id.* at 415. In 2000, however, the government decided to make accurate transmissions available for civilian use. *Id.* (citing Statement by the President Regarding the United States' Decision to Stop Degrading Global Positioning System Accuracy, 1 Pub. Papers 803 (May 1, 2000)).

This decision led to the development of civilian GPS applications, "including cellular telephones and onboard navigation systems in automobiles," which individuals voluntarily use for their own private purposes. *Id.* at 414. These applications have occasionally been misused. Private individuals have violated anti-stalking laws by using GPS devices against others without their consent. *See* Katrina Baum et al., Bureau of Justice Statistics: Stalking Victimization in the United States, at 5 (Jan. 2009) (use of GPS devices "comprised about a tenth of the electronic monitoring of stalking victims"), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svus.pdf. In addition, private companies have been severely criticized for appearing to store GPS data beyond customers' informed consent. *See* Ki Mae Huessner, *Apple Responds to iPhone Tracking Controversy*,

ABC News (Apr. 27, 2011); John R. Quain, *Changes to OnStar's Privacy Terms Rile Some Users*, N.Y. Times Wheels Blog (Sept. 22, 2011).

The decision to make unencrypted civilian signals available has also led to law enforcement efforts to use GPS surveillance devices in investigations. Accurate information about the ways in which federal and state agents use GPS technology is not available, and the federal government has not been forthcoming. *See* Pet. 24 (asserting it now "frequently use[s] tracking devices early in investigations," but with no elaboration); *ACLU v. DOJ*, —F.3d—, 2011 WL 3890837, at *2 (D.C. Cir. Sept. 6, 2011) (refusing, on privacy grounds, to release docket information about cases in which GPS data were already produced to a court). But there is evidence that, like private individuals, the government has at least sometimes abused the technology. *See, e.g.*, Kim Zetter, *Battle Brews Over FBI's Warrantless GPS Tracking*, Wired.com (Mar. 9, 2011) (describing GPS surveillance of animal rights activist); Bob Egelko, *San Jose Arab American Sues FBI Over GPS*, S.F. Chronicle (Mar. 3, 2011) (GPS tracking of college student); Jennifer Valentino-DeVries, *Senators Ask Intelligence Agencies About Location Tracking of Americans*, Wall St. Journal Digits Blog (July 14, 2011).

II. A. In September of 2005, law enforcement agents approached respondent Antoine Jones's Jeep Grand Cherokee while it was parked in a public lot in Maryland, and affixed a GPS surveillance device to the undercarriage of the vehicle without Jones's knowledge or consent. Once attached, the device au-

tomatically recorded transmissions from orbital satellites and calculated the vehicle's precise location in relation to those satellites in ten-second intervals. The device then automatically conveyed the GPS data to the government using the device's mobile transmitter. JA 81-82, 85. Although the GPS data were transmitted to remote law enforcement computers in real time, the data were also stored automatically and required no real-time monitoring. *Id.*

For the following four weeks, the GPS device calculated every movement and identified every stop Jones made in his vehicle every ten seconds of every day. Whenever the vehicle moved, the device generated location and velocity data; whenever the car was not moving, the device went into sleep mode and sent no data, thus informing law enforcement that the vehicle and device remained in place. *Id.* at 82, 84, 86-87. Over the course of a month of virtually seamless GPS surveillance, the government obtained satellite-generated data not just about Jones's discrete journeys and stops, but also patterns of movement and location. Pet. App. 33a, 36a n.*. The government had no intention to stop or minimize the GPS device's indiscriminate tracking of the jeep in the event that Mrs. Jones (in whose name the jeep was registered, *see* Br. in Opp. 3 n.1), the Joneses' college-age son, or someone other than Jones were to use the vehicle. And it made no effort to prevent the device from transmitting data on the various occasions when Jones's vehicle was parked in his family's enclosed garage. JA 181; Pet. App. 84a-85a. The government ultimately collected more than 2,000 pages worth of GPS data. *See* JA 109-110, 128.

Law enforcement agents originally obtained a warrant to install the GPS device, but they failed to comply with its terms. The warrant was valid for only ten days and authorized the installation of the GPS device within the District of Columbia; the agents installed the device onto Jones's vehicle on the eleventh day, while the vehicle was in a public parking lot in Maryland. Pet. App. 38a-39a n.*, 66a-74a, 83a. The agents thus installed and used the device without a valid warrant.

B. The government ultimately discovered large amounts of narcotics at a suspected stash house in Fort Washington, Maryland. It concluded that the GPS data showed that Jones had a habit of visiting that address. *Id.* at 30a. n.*. But the government found no narcotics or drug paraphernalia on Jones, and it had no direct evidence that Jones was responsible for the drugs in Fort Washington. *Id.* at 40a-42a. Instead, the government contended that Jones was tied to a narcotics conspiracy because of his pattern of trips to the suspected stash house, his facially innocuous (but allegedly coded) conversations with suspected customers, and the approximately $70,000 that Jones—who was the proprietor of a night club—kept in his car. *Id.* at 30a n.*, 40a-41a; JA 182.

A federal grand jury indicted Jones for conspiracy to distribute five kilograms or more of cocaine, and use of telecommunications facilities in furtherance of narcotics trafficking, in violation of 21 U.S.C. §§ 843(b) and 846. Prior to trial, Jones moved to suppress the GPS evidence. The district court denied relief, with the exception of GPS evidence obtained while the jeep was parked in Jones's garage. Those

data, the trial judge reasoned, came from inside a private residence where Jones had a reasonable expectation of privacy. Pet. App. 54a, 83a-85a.

Jones was acquitted of all unlawful telecommunications charges at his first trial, but the jury hung on the conspiracy charge. At his second trial, the GPS logs proved essential to the prosecution's case, as the government used them to link Jones to the claimed stash house. Jones was convicted of the conspiracy charge. *Id.* at 2a, 30a n.*, 39a-41a.

III. On appeal, Jones argued that both the installation of the GPS device and the resulting GPS surveillance violated his Fourth Amendment rights. The court of appeals did not address the installation claim, however, because it agreed that the use of a GPS device for 24 hours a day for a month constituted an unconstitutional search. *Id.* at 15a-42a.

The court of appeals began with *United States v. Knotts*, 460 U.S. 276 (1983), in which this Court held that there is no reasonable expectation of privacy against visual observation of a single journey on public thoroughfares, even when the observation is aided by a beeper technology that transmits radio signals and informs police whether a vehicle is getting closer or further away. The court assumed, without deciding, that *Knotts*'s holding would equally apply to GPS monitoring. *See* Pet. App. 37a (making the assumption but cautioning that "'[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment'" (quoting *Kyllo v. United States*, 533 U.S. 27, 35 n.2

(2001)). Even with that assumption, the court found *Knotts* inapplicable, because law enforcement in this case "used the GPS device not to track Jones's 'movements from one place to another,' *Knotts*, 460 U.S. at 281, but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place to place." *Id.* at 21a-22a.

The court of appeals therefore considered whether the government's four-week 24-hour GPS surveillance constituted a search. Applying the two-step framework of *Katz v. United States*, 389 U.S. 347 (1967), the court first asked whether Jones had a subjective expectation of privacy. Pet. App. 16a, 22a-31a. It held that he did. Unlike "movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *Id.* at 22a-23a. Indeed, the government pointed to no "single actual example of visual surveillance" as intrusive as the GPS tracking in this case, *id.* at 35a, and "[n]o doubt the reason is that practical considerations prevent visual surveillance from lasting very long," *id.* at 36a.

In addition, "the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts." *Id.* at 22a-23a. "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular

at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person but all such facts." *Id.* at 30a.

The court next asked whether Jones's privacy expectation was reasonable, *id.* at 32a-35a, and found that it was, because "prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse." *Id.* at 33a. In fact, prolonged GPS monitorring is more intrusive than "every police practice the Supreme Court has deemed a search under *Katz*." *Id.*

IV. The D.C. Circuit denied the government's petition for rehearing *en banc*. *Id.* at 43a-52a.

A. In an opinion concurring in the denial of rehearing en banc, Judges Ginsburg, Tatel, and Griffith explained that "because the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful." *Id.* at 44a. The government's only argument was based on the automobile exception to the warrant requirement, and that exception did not apply. *Id.*

B. Chief Judge Sentelle, joined by three others, wrote a dissenting opinion. He thought "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." *Id.* at 47a-48a.

Judge Kavanaugh separately dissented. Although he expressed agreement with Chief Judge Sentelle's opinion, he clarified that "[t]hat is not to say, however, that I think the Government necessarily would prevail in this case." *Id.* at 49a. Judge Kavanaugh would have reviewed whether Jones's Fourth Amendment rights were violated "by the police's initial installation of the GPS device on his car without a warrant." *Id.* After noting that this "property-based argument" might find support in "the Court's unanimous 1961 decision in *Silverman v. United States*, 365 U.S. 505," he concluded that it presented "an important and close question." Pet. App. 52a.

SUMMARY OF ARGUMENT

The government surreptitiously installed a GPS device onto Jones's vehicle, without his knowledge or consent. Once affixed, the GPS device automatically communicated with satellites orbiting the earth to generate and store precise longitudinal and latitudinal calculations of Jones's every move, and transmitted those data to a remote government computer. The warrantless installation and use of this device constituted unreasonable searches and seizures in violation of Jones's Fourth Amendment rights.

I. The government's installation and use of the GPS device constituted a Fourth Amendment search.

A. The government's installation and use of the device was a search, regardless of how long the device was used. Under *Katz v. United States*, 389 U.S. 347 (1967), Jones had a reasonable expectation of privacy that a satellite-based GPS device would not be affixed to his vehicle and used to generate and permanently store GPS data about his movements and locations. Three features of the government's GPS surveillance support this conclusion.

1. First, the government surreptitiously installed the GPS device onto Jones's vehicle—and thus physically intruded onto Jones's private property without his knowledge or consent. The fact that the government violated Jones's property rights to obtain these data supports the conclusion that Jones's expectation of privacy was reasonable. *Silverman v. United States*, 365 U.S. 505 (1961).

2. Second, warrantless government GPS surveillance is a grave and novel threat to the personal pri-

vacy and security of individuals. As Judge Kozinksi warned, "[t]here is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (dissenting from denial of rehearing en banc).

GPS technology empowers the government to engage in indiscriminate and perpetual monitoring of any individual's movements. It enables seamless monitoring of entire networks of individuals, political associations, even entire communities. And "the marginal cost of an additional day—or week, or month—of GPS monitoring is effectively zero." Pet. App. 36a. Unrestrained GPS monitoring is therefore a grave threat to expressive and political association, as well as to the personal privacy and security of every individual in the country.

3. Third, the government's GPS device generated and stored a unique form and quality of data that was not exposed to the naked eye. Although a person traveling on public thoroughfares knowingly exposes himself to visual observation, he does not knowingly offer GPS data to public viewing. The government can obtain GPS data only by using a GPS device.

B. The government's responses are meritless. The government first argues that obtaining evidence about Jones's movements on public streets could *never* be a search because only "technological intrusions into *private places* can infringe a legitimate ex-

pectation of privacy." Pet. Br. 22 (emphasis added). But this Court's cases establish that privacy is not an all-or-nothing concept, that privacy can flourish in public areas, and that the "fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001)).

The government also relies on *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), but those cases are not controlling. They involved visual surveillance with the aid of a now-antiquated beeper technology. They did not involve any of the three features that make GPS monitoring a Fourth Amendment search, much less all three.

C. Even if GPS surveillance is not always a search, the D.C. Circuit correctly held that it is at minimum a search when the government uses the technology for a prolonged period of time.

Prolonged use of GPS technology enables the government to generate and store patterns of movement and location that could not feasibly be obtained through visual surveillance. Although the government argues that the D.C. Circuit's decision creates an unworkable standard, this Court has full authority to adopt a bright-line rule—for instance, that GPS becomes a search when conducted for longer than a day.

II. The government's installation and use of the GPS device also constituted Fourth Amendment seizures.

A. First, the government's installation of the device meaningfully interfered in Jones's possessory right to exclude others from using his vehicle for their own ends. There is no historical or socially accepted practice of installing GPS devices onto others' cars; indeed, a private individual's surreptitious use of a GPS device against another would constitute trespass to chattels and possibly even criminal conduct. This interference was meaningful.

B. Second, the government committed a seizure when it stored GPS data about Jones's movements and locations. Because the government created the data by usurping Jones's property without his consent, Jones had a Fourth Amendment interest in that intangible data. And because the GPS device not only generated but also permanently stored the data for the government's use, the data were seized.

III. The government alternatively argues that if its GPS monitoring was a search or seizure, it should be required only to show that reasonable suspicion supported its use of the technology.

The government failed to preserve this argument in the lower courts, and should not be allowed to advance it for the first time here. The argument is also meritless. This Court's cases have departed from the warrant requirement and probable-cause standard only when special circumstances, distinct from the general interest in law enforcement, justify the departure. None are present.

ARGUMENT

I. THE GOVERNMENT'S INSTALLATION AND USE OF A GPS DEVICE TO GENERATE AND STORE DATA ABOUT JONES'S MOVEMENTS AND LOCATIONS CONSTITUTED A FOURTH AMENDMENT SEARCH

For four weeks in 2005, law enforcement agents used a GPS surveillance device to obtain satellite-generated data about every movement Jones and his wife made in their vehicle for 24 hours of every day. In order to obtain this evidence, the government first installed the GPS device onto Jones's vehicle without his knowledge or consent. Once installed, the device automatically communicated with orbital satellites to calculate its longitude and latitude at ten-second increments, and transmitted these data to a remote government computer. It ultimately generated and stored over 2,000 pages of data about Jones's movements and locations over the four-week period.

The government's installation and use of the GPS device constituted a Fourth Amendment search for two reasons. First, GPS surveillance is a search when conducted for any amount of time, because it involves a uniquely intrusive technology that operates by converting an individual's vehicle into a satellite-data transceiver at the government's service. Second, as the D.C. Circuit correctly held, GPS surveillance is a search at least when the government generates and stores data for a prolonged period of time.

None of this is to deny that GPS devices are a

valuable law enforcement tool. And none of this precludes the government from using GPS technology zealously in its investigations. But the government must obtain the authorization of a neutral magistrate—or qualify for a valid exception to the warrant requirement—before doing so.

A. The Government's Installation And Use Of A GPS Device Constituted A Search Regardless Of The Amount Of Time It Was Used

Under *Katz v. United States*, 389 U.S. 347 (1967), and post-*Katz* cases, the government engages in a Fourth Amendment search whenever it intrudes on a subjective expectation of privacy that society is prepared to accept as reasonable. *See id.* at 360 (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979). An expectation of privacy is "reasonable" when it is consistent with "widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). There is no "talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable," *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality op.), but the Court has in the past measured the reasonableness of privacy expectations against "the everyday expectations of privacy that we all share," *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

In this case, Jones held a subjective expectation of privacy against the government's GPS surveillance. He had no knowledge of any socially accepted practice of installing GPS devices onto others' vehicles without their consent, and the government does

not suggest that such a practice exists. Jones therefore had no reason to believe that his movements and locations would be subjected to GPS surveillance without *his* consent.

Jones's expectation of privacy, moreover, is "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Three features of the government's GPS surveillance support this conclusion. First, GPS devices generate and store data about a person's movements and locations only if they are physically affixed to a person's private property; they operate by converting that property into a satellite-data transceiver at the government's service. And in this case, the government surreptitiously installed the device onto Jones's vehicle without his authorization. Second, warrantless GPS surveillance poses harrowing threats to personal privacy and security—threats that have until now existed only in dystopian novels. Third, GPS devices generate and store a unique form and quality of evidence that is not deliberately exposed to public view.

1. *The Physical Intrusion Onto And Usurpation Of Jones's Property*

The government installed the GPS device onto Jones's vehicle surreptitiously, without his knowledge or consent. The fact that an unauthorized physical intrusion onto, and usurpation of, Jones's property was a necessary feature of the government's GPS surveillance supports the conclusion

that his privacy expectations were reasonable.[1]

a. The Fourth Amendment protects "property as well as privacy." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). Its protections take account of property law concepts not only because they aid in determining whether the government has committed a seizure, *see infra* II.A., but also because they are an important and sometimes dispositive consideration in determining whether a subjective expectation of privacy is one that society is prepared to accept as reasonable. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (an "expectation is reasonable" if it "has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society'" (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978))).

Because "[o]ne of the main rights attaching to property is the right to exclude others," this Court has recognized that "one who owns or lawfully possesses or controls property will, in all likelihood, have a legitimate expectation of privacy by virtue of

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[1] The vehicle was registered in his wife's name, *see supra* p.4, but "[e]xcept with respect to his [wife], Jones had complete dominion and control over the [vehicle], and could exclude others from it." *Rakas v. Illinois*, 439 U.S. 128, 149 (1978). For Fourth Amendment purposes, the vehicle belonged to him. *See Minnesota v. Carter*, 525 U.S. 83, 95 (1998) (Scalia, J., concurring) ("People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free—*so long as they actually live there*.").

this right to exclude." *Rakas*, 439 U.S. at 143 n.12 (citing W. Blackstone, Commentaries, Book 2, ch. 1); *see also Bond v. United States*, 529 U.S. 334, 337 (2000) ("Physically invasive inspection is simply more intrusive than purely visual inspection."). As Judge Kavanaugh observed, "[i]f a person owns property or has a close relationship to the owner, access to that property usually violates his reasonable expectation of privacy." Pet. App. 52a (citation, alteration and internal quotation marks omitted)).

The Court recognized these principles in its unanimous decision in *Silverman v. United States*, 365 U.S. 505 (1961). There, the government recorded conversations using a "spike mike" that "usurp[ed] part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent." *Id.* at 506-07. The Court held that this usurpation of private property was a search, even though (as the government pointed out) then-valid precedent authorized the government to use sensitive microphone technology to record the same conversations without a physical trespass. The use of the spike mike was a search because it worked by "ma[king] contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound." *Id.* Because the officers overheard the conversations "only by usurping part of the petitioners'" property, *id.* at 511, their conduct amounted to a search, even though the physical intrusion was no more than "a fraction of an inch," *id.* at 512.

b. *Silverman* is controlling here. The government secretly installed a GPS device onto the underbody of Jones's car, where he was exceedingly unlikely to detect the intrusion onto, and continuing use of, his property for the government's own surveillance ends. By "mak[ing] contact" with Jones's vehicle, the government "usurp[ed]" Jones's property and "convert[ed] th[e] entire" car into a satellite-data transceiver at the government's service. *Id.* at 506-07. And it was this unauthorized physical intrusion that made it possible for the GPS device to generate data about Jones's every stop and move. Although the government asserts that its four-week intrusion was "ephemeral," Pet. Br. 47 n.6, it was far less "ephemeral" than the three-day contact in *Silverman*, *see* 365 U.S. at 506. Accordingly, under *Silverman*, Jones had a reasonable privacy expectation that his vehicle was available solely for his use, and could not lawfully be simultaneously used by the government—or any other entity—to closely monitor his daily life and routine without his consent.[2]

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[2] The government contends that *Silverman* has been overruled by *Katz*. Pet. Br. 46 n.6. That is incorrect. *Katz* overruled decisions holding that the government can *only* commit a search by committing a physical trespass; it did not overrule *Silverman*'s recognition that if the government usurps property to obtain evidence, its conduct is more likely to be a search. *See* Pet. App. 51a (Kavanaugh, J., dissenting from denial of rehearing en banc) (seeing "no indication" that *Silverman* is not "still good law"); *see also id.* at 50a (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (explaining that *Silverman* remains good law after *Katz*)).

The reasonableness of Jones's privacy expectations is confirmed by the fact that no private individual could lawfully engage in similar conduct. A private individual's surreptitious installation of a GPS tracker onto the property of another to monitor the owner's movements is not only a trespass to chattels, *see* Restatement (Second) of Torts § 217(b) & cmt. e (1965), but can form the basis for criminal liability under the laws of various states.[3] And the police would certainly not expect that anyone could permissibly affix GPS devices onto city patrol cars to secretly track police movement. For these reasons, the government cannot plausibly argue that by installing the GPS device onto Jones's vehicle, it was merely doing what any member of the public could do to any other. No one has the right to affix a GPS device onto another person's vehicle without her consent. And Jones reasonably expected that no one—not private individuals and certainly not the government acting without a warrant—would usurp his property in order to generate and record GPS data about his movements and locations. *See* William J.

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[3] *See, e.g.*, *People v. Sullivan*, 53 P.3d 1181 (Colo. Ct. App. 2002) (husband using GPS against wife found guilty of harassment by stalking); *L.A.V.H. v. R.J.V.H.*, 2011 WL 3477016, at *4 (N.J. Super. Ct. Aug. 10, 2011) (ex-husband's use of GPS to follow and monitor ex-wife constitutes stalking); *M.M. v. J.B.*, 2010 WL 1200329 (Del. Family Ct. Jan. 12, 2010) (father convicted of felony offense of stalking for placing GPS device on mother's vehicle); *Heil v. State*, 888 N.E.2d 875 (Ind. Ct. App. June 12, 2008) (husband convicted of first degree stalking for using GPS device to track his wife).

Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo. Wash. L. Rev. 1265, 1268 (1999) (because the government "can easily condition the citizenry to expect little or no privacy," "Fourth Amendment privacy protection must be tied to something other than what people expect from the police," and "[t]he law's solution is to tie its protection to what people expect from one another.").

Nor is there any historical tradition or socially accepted practice of installing GPS devices onto others' property which would cut against the reasonableness of Jones's privacy expectations. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966) (finding no reasonable privacy expectation against government informers because "[c]ourts have countenanced the use of informers from time immemorial" (citation and internal quotation marks omitted)). Although photography and video camera recordings are now arguably ubiquitous and accepted activities in the public sphere, the same cannot be said about surreptitious GPS monitoring of others. Civilian GPS applications are popular, to be sure, but they are used by individuals who voluntarily choose to employ them for their own private purposes. And "the great popularity of GPS technology for its many useful applications may not be taken simply as a massive, undifferentiated concession of personal privacy to agents of the state," *People v. Weaver*, 882 N.Y.S.2d 357, 362 (N.Y. 2009), just as the great popularity of inviting guests to dinner may not be taken as a massive, undifferentiated concession of personal privacy

to government trespassers.[4]

c. *Oliver v. United States*, 466 U.S. 170 (1984), on which the government relies, does not diminish the significance of property interests under the Fourth Amendment. The Court there held that the government does not commit a search when it trespasses onto open fields—and it further held that individuals have no privacy interests against being visually observed while they or government agents are in open fields. *Id.* But the Court reached this conclusion on the grounds that the "explicit language" of Fourth Amendment protects only "persons, houses, papers, and effects," and that open fields are neither "houses" nor "effects." *Id.* at 176-77 & n.7. In this case, the government did not trespass upon Jones's unprotected open fields; it trespassed upon his vehicle, which is undoubtedly an "effect" protected by the Fourth Amendment. *See* Pet. App. 52 (Kavanaugh,

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[4] Indeed, three state legislatures have even directly barred their law enforcement officials from engaging in warrantless GPS surveillance, *see* Minn. Stat. Ann. § 626A.35 (2009); Haw. Rev. Stat. Ann. § 803-44.7 (2007); Utah Code Ann. § 77-23a-15.5(8) (2005) (clarifying that it is only appropriate to install GPS devices on one's own car); 2005 Ut. ALS 75 (2005) (explaining that "individuals other than law enforcement officers may attach mobile tracking devices to their own property"), and a fourth has explicitly recognized a reasonable expectation of privacy against GPS surveillance, *see* Cal. Penal Code § 637.7, Stats. 1998 c. 449 § 2. *See generally City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (state statutes regulating a means of obtaining information can support a finding that expectations of privacy are reasonable).

J., dissenting from denial of rehearing en banc) (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). And here, the government did not just trespass on Jones's car; it usurped his car for its own monitoring purposes in a way that would expose private persons to criminal liability in several states.

Vehicles are not only "effects," but particularly important ones in modern society. *Cf. Katz*, 389 U.S. at 352 (considering "the vital role that the public telephone has come to play in private communication"); *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (pervasiveness of mobile devices "might strengthen the case for an expectation of privacy"). Automobiles are a "basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities." *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979). "As the symbol of 'freedom,' motor vehicles play an essential role in the modern American lifestyle." Yihua Liao, *Vehicle Ownership Patterns of American Households* (2002), *available at* http://www.utc.uic.edu/~fta/Information%20Briefs/vehicles3.pdf. And "'[i]n this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles.'" 1 Wayne R. LaFave, Search & Seizure § 2.7(e) (4th ed. 2010) (quoting *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003 (en banc)) (hereinafter LaFave). Allowing the government to install GPS surveillance devices onto individuals' private automobiles without any suspicion or judicial oversight—or any Fourth Amendment constraint at all—would be inconsistent with widely held expectations of privacy and security.

And a ruling in the government's favor would sweep more broadly than vehicles, because if GPS surveillance were not a search, the government would be free to install devices onto *all* effects carried in public—briefcases, books, and even clothing—and to do so indiscriminately without any justification at all. This will be made even easier by future forms of the technology; "GPS products are in development that will be small enough to implant under the human skin." Hutchins, *supra*, at 421.

2. *The Unique Dangers Posed By Unrestrained GPS Monitoring*

The second feature of GPS technology that supports the reasonableness of Jones's privacy expectations is that it poses a substantial threat to the privacy and personal security the Fourth Amendment is designed to protect. As Judge Cudahy observed, GPS is "a technology surely capable of abuses fit for a dystopian novel." *United States v. Cuevas-Perez*, 640 F.3d 272, 276 (7th Cir. 2011). Or as Judge Kozinski put it: "There is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (dissenting from denial of rehearing en banc).

GPS technology presents these dangers because it enables the government to capture, at vanishingly low costs, "[t]he whole of a person's progress through the world, into both public and private spatial spheres ... over lengthy periods possibly limited only

by the need to change the transmitting unit's batteries." *Weaver*, 882 N.Y.S.2d at 361. As the D.C. Circuit explained, "[c]ontinuous human surveillance for a week would require all the time and expense of several police officers," and "comparable photographic surveillance would require a net of video cameras so dense and so widespread as to catch a person's every movement, plus the manpower to piece the photographs together." Pet. App. 36a; *see also id.* at 36a n.* (quoting testimony of the former Chief of the Los Angeles Police Department that "constant and close" visual surveillance "is not only more costly than any police department can afford, but in the vast majority of cases it is impossible" (citation and internal quotation marks omitted). Indiscriminate GPS monitoring "is not similarly constrained." *Id.* at 36a. "On the contrary, the marginal cost of an additional day—or week, or month—of GPS monitoring is effectively zero." *Id.*; *see also Pineda-Moreno*, 617 F.3d at 1124 (Kozinski, J., dissenting from denial of rehearing en banc) ("A small law enforcement team can deploy a dozen, a hundred, a thousand such devices and keep track of their various movements by computer, with far less effort than was previously needed to follow a single vehicle.").

The concern is of course not that GPS technology will aid the government in detecting crime. Rather, it is that if law enforcement agents are permitted to use GPS technology without first obtaining a warrant, they will use it to capture broad swaths of innocent information. That is precisely what the government did here: it tracked Jones for 24 hours of

every day, and recorded all of his movements, regardless of whether he was traveling to the suspected stash house or not, regardless whether he or his wife was driving the vehicle, and regardless of whether he was on public streets or within his enclosed garage. *See supra* p.4. And it is what the technology generally does: once a GPS device is placed on a car, it indiscriminately generates and stores GPS data about all of a person's movements for as long as the device is left in place.

The threat of indiscriminate monitoring is heightened because surreptitious GPS tracking requires no human involvement beyond installing the device and changing its batteries. Law enforcement therefore can use the technology to expand dramatically the scope of its surveillance activities without being subject to public scrutiny or being held accountable for abuses. *See Illinois v. Lidster*, 540 U.S. 419, 423-27 (2004) (Fourth Amendment protections are less urgent when police practice is conducted in full view—*e.g.*, vehicle roadblocks—and is thus constrained not only by "limited police resources" but also "community hostility"); *see also* David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 Minn. L. Rev. 563, 573 (1990) ("police accountability" "is absent when the community never learns of unjustified or errant police searches, as in the case of secret sense-enhanced searches," and police may therefore be "far less hesitant to engage in questionable, arbitrary, or inappropriate sense-enhanced searches"). Moreover, the technology could be capriciously used by *any* government official—not just by trained law enforcement officers. Warrantless GPS

tracking thus threatens to "alter the relationship between citizen and government in a way that is inimical to democratic society." *Cuevas-Perez*, 640 F.3d at 285 (Flaum, J., concurring in the judgment).

Indeed, unless constrained by the Fourth Amendment, the low cost and ready availability of GPS devices will encourage federal, state, and local governments to engage not only in seamless, prolonged GPS monitoring of individuals, but also mass, suspicionless GPS monitoring of networks of individuals and even entire neighborhoods, towns, or cities. *See* Pet. Br. 29 (arguing that "'the reasonable expectation of privacy as to a person's movements on the highway is ... zero,'" and "'[t]he sum of an infinite number of zero-value parts is also zero'" (quoting Pet. App. 47a-48a)). With little effort, government employees could install GPS devices onto the cars of all of their political rivals, of every person attending a political rally, or of every customer of a bookstore or barbershop. Unrestrained GPS surveillance would thus be a grave threat to political and expressive association—both of which often depend on privacy to survive. *See NAACP v. Button*, 371 U.S. 415 (1963); *cf. United States v. White*, 401 U.S. 745, 762 (1971) (Douglas, J., dissenting) ("Monitoring, if prevalent ... kills free discourse").

These concerns strike at the very heart of what the Fourth Amendment is designed to protect. The "basic purpose" of the Amendment, "as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *see also*

Wolf v. Colorado, 338 U.S. 25, 27 (1949) (Frankfurter, J.) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."). The Amendment therefore protects against "invasion of [an individual's] indefeasible right of personal security, personal liberty, and private property." *Boyd v. United States*, 116 U.S. 616, 630 (1886). But security cannot long reside in a people whose movements and locations are perpetually subject to warrantless GPS monitoring by their government.

3. *The Nature Of GPS Data*

The third feature of GPS technology that confirms the reasonableness of Jones's privacy expectations is the fact that GPS produces distinctive evidence—including precise longitudinal and latitudinal positions calculated by the device's distance from orbital satellites—which are different in both form and quality from the evidence that can be obtained through visual surveillance.

An officer who engages in visual surveillance records what she sees as a personal recollection. The same is true when she engages in visual surveillance with the aid of a beeper device. And if she takes notes or photographs, she "merely preserves the human observation in a fixed form" in order to "avoid forgetting what [she] ha[s] learned." Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700, 714-15 (2010) (hereinafter Kerr).

By contrast, GPS devices not only supplant human observation, but also generate a form and qual-

ity of evidence that visual observation could not produce. The device's automated tracking process generates a moment-by-moment calculation of the distance of a vehicle from multiple satellites in orbit above the earth, after which the calculations are transmitted to a government computer in the form of seamless location data onto an interactive map. *Id.* These location and velocity calculations are materially different from what the human eye observes. GPS data may be useful for some of the same purposes as the fruits of visual observation—and in a general sense, both GPS surveillance and visual surveillance produce "location information," Pet. Br. 22—but GPS data are nonetheless unique in form and quality.

Accordingly, "GPS is not a mere enhancement of human sensory capacity[;] it facilitates a new technological perception of the world," one that is not exposed to visual observation. *Weaver*, 882 N.Y.S2d at 361. A person traveling on public thoroughfares knowingly exposes himself to visual observation, but he does not knowingly offer satellite-calculated GPS data to public viewing. GPS data can be obtained only through the use of a GPS device.[5]

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[5] The plurality opinion in *White*, 401 U.S. at 751, is consistent with this analysis. It concluded that voluntary conversations with an undercover agent are not protected by the Fourth Amendment, even if the agent is secretly recording the conversation. *Id.* But it reached this conclusion because of the consensual interaction; "government monitoring with the confidant's consent is reasonable under the Fourth Amendment." *Randolph*, 547 U.S. at 131 (Roberts, C.J., dissenting) (citing *White*, 401 U.S.

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GPS devices require a physical intrusion onto, and usurpation of, an individual's private property; they are uniquely threatening to the privacy and security of individuals; and they capture evidence in a form and of a quality not obtainable through visual surveillance. For these reasons, Jones's subjective expectation of privacy against GPS surveillance was one that society is prepared to accept as reasonable. The government's use of GPS technology against Jones constituted a Fourth Amendment search.

B. The Government's Responses Lack Merit

The government offers three responses. First, it argues that when information is exposed to public viewing of any sort, it does not matter what means the government uses to obtain the information. Second, it argues that *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), establish that GPS surveillance is not a search. Third, it argues that GPS technology has not yet been misused and the Court should disregard the potential for abuse. These arguments fail.

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at 752). And there is no comparable consensual interaction here. Jones did not lend his vehicle to anyone; no third party (other than his wife) had the legal authority to install a GPS device. Nor did Jones make any deliberate disclosure of GPS data to a third party. He did not even create his own GPS data, much less voluntarily convey them to a third-party service provider. To the extent the government relies on third-party disclosure cases, *see* Pet. Br. 31-32, its reliance is misplaced.

1. *The Fourth Amendment Protects Against Uniquely Intrusive Means Of Obtaining Evidence Even If Similar Information Could Have Been Obtained Through Less Intrusive Means*

The government's first argument is, in essence, that the means do not matter. According to the government, there is a bright line between matters exposed to public view and matters that are private, and "a person has no reasonable expectation of privacy in information that is exposed to public view." Pet. Br. 18. It therefore argues that obtaining evidence about movements on public streets could *never* be a search; only "technological intrusions into *private places* can infringe a legitimate expectation of privacy." *Id.* at 22 (emphasis added).

This analysis is flawed. The Fourth Amendment protects against uniquely intrusive means of obtaining evidence—such as the government's physically intrusive, privacy-threatening, and satellite-data-generating GPS device in this case—even if the government could obtain similar information through other means, and even if the intrusive means is used in a public space.

a. This Court's precedents establish that privacy is not an all-or-nothing concept. Although it is often impossible or too costly for an individual to protect his actions or information from *all* conceivable types of viewing, a privacy expectation against *some* types of viewing can still be reasonable if consistent with widely shared social expectations. "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of

means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at 35 n.2; *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Fourth Amendment rights "are to be protected even if the same result might have been achieved in a lawful way"). Thus, the government's use of thermal imaging devices is a search, even though the government may be able to obtain information about heat emanating from the home by observing snow melting on the exterior of house walls, *Kyllo*, 533 U.S. at 35 n.2, or by obtaining the utility power records that are shared with third parties, *see, e.g.*, *United States v. McIntyre*, 646 F.3d 1107, 1111-12 (8th Cir. 2011).

The Court made this clear in *Silverman*: it found that the use of a physically intrusive spike mike was a search, even though, under then-existing law, the government could have used sensitive microphone technology to capture the same information. *See supra* I.A.1. Other decisions have reached similar results. In *Walter v. United States*, 447 U.S. 649 (1980), the Court held that even though FBI agents were free to observe the exterior packaging of contraband motion pictures, and the packaging "clearly revealed the nature of their contents," *id.* at 663 (Blackmun, J., dissenting), it was nonetheless an independent intrusion—and a search—to project the films to confirm their content, *see id.* at 654 (opinion of Stevens, J.); *id.* at 660 (opinion of White, J.). And in *Katz*, this Court found a reasonable expectation of privacy against the bugging of a public telephone booth, even though the government could have acquired the same information from the recipient of the call, or a lip reader, or a passerby who overheard

the conversation. 389 U.S. at 352.

To be sure, the Court has recognized that an individual may lack a reasonable expectation of privacy when she fails to take ordinary precautions to keep her information private. But these cases are not based on the mere fact that an individual is in public. Instead, they are based on the principle that if a person could have, but did not, take ordinary steps to prevent public observation, she cannot legitimately expect government agents to avert their eyes from what any member of the public could see—regardless of where she happens to be. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445 (1989); *Carter*, 525 U.S. at 104 (Breyer, J., concurring in the judgment).

And this Court has repeatedly affirmed that expectations of privacy may thrive in public places. In *Chadwick*, 433 U.S. at 7, the Court rejected the proposition that the Fourth Amendment "protects only dwellings and other specifically designated locales," and it reaffirmed that the Amendment "'protects people, not places,'" *id.* at 7 (quoting *Katz*, 389 U.S. at 351)). In *United States v. Dunn*, 480 U.S. 294 (1987), the Court recognized that the Fourth Amendment protects not just the home, but also the curtilage that surrounds the exterior of a home, *see id.* at 300. In *Kyllo*, it rejected a "mechanical interpretation of the Fourth Amendment" that would strip protection from any evidence radiating from a private area and into a public space. 533 U.S. at 25. In *Prouse*, it observed that "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks" or "when they step from the sidewalks into their auto-

mobiles." 440 U.S. at 663. And in *Bond*, the Court found reasonable privacy expectations against tactile examinations of carry-on luggage, even when luggage is in a public bus and the passenger "clearly expects that his bag may be handled." 529 U.S. at 337-38.

b. Together these cases confirm that, even if information is exposed in many ways, an individual may still reasonably expect that a unique form of evidence *about* that information will not be captured through a means that offends widely shared social expectations. And they show that the government errs in attempting to create a dichotomy between information in public places and information in private places—and between things that are completely exposed and things not exposed at all.

Tellingly, the government's proposed dichotomy is founded upon an inaccurate quotation of *Katz*. The government relies on *Katz*'s statement that "'[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection.'" Pet. Br. 17-18 (quoting *Katz*, 389 U.S. at 351). But the government uses an ellipsis to obscure the fact that *Katz*'s "knowingly exposes" language was not focused on public places at all. *See Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, *even in his own home or office*, is not a subject of Fourth Amendment protection." (emphasis added)). Indeed, the next sentence in *Katz*, which the government fails to mention, explains that what an individual "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Id.* (emphasis added).

As the complete and unaltered quotation from *Katz* shows, this Court has not drawn a categorical, *a priori* line between public and private places. The question is always whether people have a reasonable privacy expectation against the specific method of obtaining evidence that the government has chosen to employ. It would not be a search to sneak up behind a person having a whispered cell phone conversation in a public park—but it would be a search to bug the person's phone. "When it comes to the Fourth Amendment, the means do matter." Pet. App. 37a.

2. Knotts *And* Karo *Did Not Involve The Features That Make GPS Surveillance A Search*

In support of its argument that GPS surveillance is not a search, the government relies on this Court's decisions in *Knotts* and *Karo*, in which the Court upheld the use of a now-antiquated beeper technology to facilitate visual surveillance. But neither case involved any of the three features that make GPS monitoring a search: there was no unauthorized usurpation of property for government use; the beeper technology did not realistically raise the specter of perpetual surveillance; and the beeper technology did not generate a unique form of evidence.

a. The beeper technology, as used in *Knotts* and *Karo*, did not involve an unauthorized physical intrusion onto personal property. In both cases, the beepers were installed into cans that the respondents later placed into their cars. But in both cases, the beepers were installed with the consent of the cans' owners.

In *Knotts*, government agents obtained the consent of the company that owned and sold chloroform cans to place a beeper into one of them. 460 U.S. at 279. The company then delivered the can to one of the respondent's associates, who mistakenly relied on the company in accepting the can and placing it in his vehicle. *Id.* Given that the government had not committed any unauthorized physical intrusion, the respondent expressly declined to raise an argument based on *Silverman*—and even confessed that "he did not believe he had standing to make such a challenge." *Id.* at 279 n. *; *see* Pet. App. 50a (Kavanaugh, J., dissenting from denial of rehearing en banc).

The facts of *Karo* were analogous. The beeper device in *Karo* was inserted, not into the private property of an unsuspecting individual, but into an ether can that belonged to the Drug Enforcement Agency. *Id.* at 708, 711. With the consent of a store clerk who had received a shipment of ether cans, the "agents substituted their own can containing a beeper for one of the cans in the shipment, and then had all 10 cans painted to give them a uniform appearance." *Id.* *Karo* thus did not raise a *Silverman* issue; there was no government intrusion onto private property without an owner's knowledge or consent. The respondents in *Karo* were left having to challenge the fact that the beeper was in the can at the moment the store owner transferred them—and the Court rejected *that* argument. *Id.* at 712 ("The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest.").

b. Furthermore, the beeper technology used in

Knotts and *Karo* did not raise realistic concerns about perpetual 24-hour surveillance. Instead, the Court compared the beeper device to a "searchlight" because it merely made visual surveillance more effective. *Id.* This enhancement of visual surveillance did not eliminate the need for direct human involvement. It therefore did not eliminate the marginal costs of prolonged and mass surveillance of an individual or networks of individuals, and did not significantly reduce the likelihood that excessive police presence would be met with "community hostility." *Lidster*, 540 U.S. at 426. Any concerns were further undermined by the fact that visual surveillance—which beeper technology merely facilitated—is an ancient practice that "was unquestionably lawful" at common law. *Kyllo*, 533 U.S. at 31-32 (quoting *Boyd*, 116 U.S. at 628).

Notably, the Court did not hold that sensory-supplanting technology *never* raises constitutional concerns; it merely held that the beeper technology of that day raised none. As the Court explained, "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them *in this case*." *Knotts*, 460 U.S. at 282 (emphasis added); *see also id.* at 285 ("[S]cientific enhancement *of this sort* raises no constitutional issues which visual surveillance would not also raise." (emphasis added)); *see also* 468 U.S. at 713-14 (same).

c. Finally, the beeper technology used in *Knotts* and *Karo* did not generate or store a unique form or quality of data. Indeed, it generated no evidence on

its own. It merely emitted a radio signal that a law enforcement officer could receive and use as a guide for his own visual surveillance. As the beeper got closer, the radio signal got louder; as the beeper got further away, the radio signal dimmed. *Knotts*, 460 U.S. at 277. Therefore, as noted, the Court found that beeper technology was akin to a "searchlight," which facilitates visual surveillance but does not generate any evidence on its own. *Id.*

* * * *

To be sure, *Knotts* states that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. But the Court "must read this and related general language in [*Knotts* and *Karo*] as [it] often read[s] general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Lidster*, 540 U.S. at 424. *Knotts*'s general language should be understood as applying to visual surveillance augmented by technology that did not involve (i) a challenged, unauthorized physical intrusion onto and usurpation of another's property, (ii) the realistic threat of mass and unending monitoring, or (iii) the acquisition of unique satellite-generated digital data. But if the Court were to conclude, contrary to its customary manner of reading prior decisions, that *Knotts* and *Karo* establish a more general principle that governs this case, then they should be confined to their specific facts and otherwise overruled. General language written

thirty years ago—and at a time when the seamless, perpetual surveillance that GPS makes possible was merely "science fiction," *Cuevas-Perez*, 640 F.3d at 279 (Flaum, J., concurring in the judgment)—should not be stretched beyond the facts on which they were based.

3. *The Court Should Not Disregard The Threat That Warrantless GPS Surveillance Poses To Core Fourth Amendment Interests*

The government's final response is that the Court "should not depart from its established reasonable-expectation-of-privacy framework to account for hypothetical misuse of technology that does not occur in reality." Pet. Br. 37. But the question is not whether some hypothetical future technology might make indiscriminate, perpetual, and mass surveillance possible; GPS presents those dangers now. And this Court has never afforded the government free reign to use privacy-threatening methods merely because of government promises that the power will not be abused. To the contrary, the Court has recognized that "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise that must rightly engage their single-minded attention." *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968)). Reasonable expectations of privacy must be protected by more than executive grace.

The government counters that "[t]he court of appeals pointed to no evidence that law enforcement

officers engage in GPS monitoring of vehicles without any suspicion of criminal activity." Pet. Br. 35. It does not *deny* that misuse of GPS technology is occurring; it merely notes the absence of evidence in the court of appeals's opinion. *Id.* And some evidence of abuse exists. *See supra* p.3. More might be available if the government were more forthcoming in disclosing the scope and nature of its use of GPS, which it acknowledges has been increasing. *Id.* In any event, the Fourth Amendment should be enforced even if the approximately 765,000 sworn state and local law enforcement agents and 105,000 sworn federal agents across the nation—and the innumerable non-law-enforcement employees at all levels of government—have not yet begun to abuse GPS technology.[6] The Fourth Amendment must be applied to "prevent stealthy encroachment upon or gradual depreciation of the rights secured by [it], by imperceptible practice of courts or by well-intentioned, but mistakenly over-zealous, executive officers." *Johnson v. United States*, 333 U.S. 10, 16 n.8 (1948) (citation and internal quotation marks omitted). That is why the Court in *Kyllo* did not ask for evidence that thermal imaging technology was being abused—or that future versions of the technology would be. 533 U.S. at 36.

The government seeks to allay concerns of abuse by asserting that "general [GPS] monitoring would

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[6] *See* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, Cato Supreme Court Review 256 n.83 (10th ed. 2011) (citing sources).

ordinarily prove to be an extraordinarily inefficient and unproductive use of law enforcement resources," because officers "would have to sift through and analyze voluminous lists of geographic coordinates ... hoping to find some indication of criminal activity." Pet. Br. 35. This assertion elides the fact that the government could easily generate and store GPS data without analyzing it immediately. It also ignores the fact that GPS technology is fast-improving, *see* Hutchins, *supra*, at 420, and that computer software will increasingly automate even the parsing and analysis of satellite-generated data. Even if "the technology used in the present case was relatively crude, the rule [the Court] adopt[s] must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36.

The government also notes that privacy-protective statutes could be enacted. *See* Pet. Br. 35-37. But this Court has never held that because legislatures could protect privacy, the Fourth Amendment ought not. And when it reaffirmed the application of the Amendment to wiretaps implicating domestic national security in *United States v. United States Dist. Court*, 407 U.S. 297, 320 (1972), the Court rejected the government's argument that "internal security matters are too subtle and complex for judicial evaluation," and observed that "[i]f the threat is too subtle or complex for our senior law enforcement officers to convey its significance to court, one may question whether there is probable cause for surveillance," *id.* at 320. At the same time, it recognized that "Congress may wish to consider protective standards" of its own, which "may be com-

patible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." *Id.* at 322-23. Congress took up the suggestion six years later, enacting the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801 *et seq*. The Court should thus enforce the Fourth Amendment, even if legislation is desirable. Legislative action will become more likely if this Court first recognizes that reasonable privacy expectations exist and must be protected.[7]

C. The Government's Installation And Use Of The GPS Device For 24 Hours A Day For Four Weeks Constituted A Search

Even if GPS surveillance were not always a search, the government's conduct in this case would still be a search. As the D.C. Circuit correctly held, GPS surveillance is at least a search when conducted for prolonged periods. Contrary to the government's position, the Fourth Amendment does not allow it to engage in indiscriminate, month-long GPS monitor-

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[7] The Court did leave privacy protection to the legislatures in one notable case: *Olmstead v. United States*, 277 U.S. 438 (1928), which freed wiretapping from all Fourth Amendment restraints. In the decades following the decision, the FBI recorded hundreds of thousands of personal communications, not only of civil rights leaders but also of attorneys and their clients and even of sitting Supreme Court justices. *See* Alexander Charns, Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court 17-18, 24-31, 52 (1992). *Olmstead* should not be this Court's guide.

ing of a person without any justification at all.

1. *Information About A Person's Pattern Of Movements And Locations Is Uniquely Private*

Prolonged GPS surveillance enables the government to record information about a person's pattern of movement to a degree not feasible through visual surveillance. Although an individual's discrete travels on public roads may be observable by the naked eye, the same cannot be said of an individual's pattern of minute-by-minute movements and stops. Unlike a person's "movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil." Pet. App. 26a; *see also id.* at 36a & n.*. Because prolonged surveillance is exceedingly unlikely—and is practically impossible unless the government is willing to violate a person's property rights by installing a GPS device—expectations of privacy against the practice are reasonable. *See Bond*, 529 U.S. at 339 (bus passenger "expects that his bag may be handled," but he reasonably "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner").

Furthermore, information about a person's pattern of movements and locations is uniquely private. *See* Pet. App. 27a-28a (individuals can have "a privacy interest in the aggregated 'whole' distinct from their interest in the 'bits of information' of which it was composed" (quoting *DOJ v. Nat'l Reporters Committee*, 489 U.S. 749, 764 (1989)); *see also* Daniel

J. Solove, Understanding Privacy 106-16 (2008). For that reason, *Knotts* warned that the Fourth Amendment might not tolerate a future technology that enabled "twenty-four hour surveillance of any citizen of this country." *Knotts*, 460 U.S. at 283 (citation and internal quotation marks omitted). The advent of GPS technology has made *Knotts*'s hypothetical concern a present danger.[8]

Accordingly, GPS monitoring is a search at least when conducted for prolonged periods of time. This is not to say that obtaining pattern data is *always* a search. The prolonged use of GPS devices is a search because it both makes it possible to capture pattern information *and* is a uniquely intrusive means of doing so. *See supra* I.A; *see also* Pet. App. 37a ("When it comes to the Fourth Amendment, the means do matter."). And prolonged GPS monitoring is a search even if it does not ultimately produce pattern

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[8] The government rejoins that *Knotts* reserved only the question whether *mass* surveillance—which the government makes little effort to define—raises concerns. It draws that conclusion from *Knotts*'s reference to "dragnet" surveillance, which the government says can only refer to surveillance of multiple individuals. This argument is irrelevant. GPS surveillance of even a single individual for a month—or a year, or his entire lifetime—poses a grave concern. The argument is also incorrect: *Knotts*'s "dragnet" reference was made in response to an argument about 24-hour surveillance "of any citizen." Pet. App. 17a-18a. And "dragnet" can refer to "any system for catching a person, esp. a fugitive criminal." The Living Webster Encyclopedic Dictionary of the English Language 300 (1975).

data in a given case, just as lifting a turntable in a home is a search even if no intimate details are uncovered. "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

2. *The D.C. Circuit's Decision Is Workable*

The government criticizes the D.C. Circuit's holding as creating an unworkable standard. To the extent the Court wishes to adopt the D.C. Circuit's narrower rule, however, administrability concerns are no barrier to its adoption.

This Court has full authority to give concrete doctrinal content to what constitutes prolonged GPS monitoring, just as it has done in other areas. *See, e.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (adopting rule that judicial determinations of probable cause for detention are sufficiently prompt if provided within 48 hours of arrest); *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) (adopting 14-day rule for reinitiation of custody). It would be reasonable, for example, to hold that monitoring for longer than a day is a search. But if the Court concludes it does not wish to undertake such line-drawing, the answer is not to unleash unchecked government GPS monitoring and recording. The answer is to hold that any GPS monitoring is a search.

II. THE GOVERNMENT'S INSTALLATION AND USE OF A GPS DEVICE CONSTITUTED FOURTH AMENDMENT SEIZURES

The D.C. Circuit correctly held that the government engaged in a search. But the government vio-

lated Jones's Fourth Amendment rights for another reason: the installation and use of the GPS device were seizures. The installation was a seizure because it meaningfully interfered with Jones's possessory interest in excluding others from exploiting or usurping his vehicle. The use of the device was a further seizure because it generated and stored GPS data that the government sought to use against Jones.

A. The Installation Of The GPS Device Onto Jones's Vehicle Constituted A Fourth Amendment Seizure

1. *The Government Commits A "Seizure" When It Meaningfully Interferes With A Possessory Interest*

"The great end, for which men entered into society, was to secure their property." *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765); *see also* 1 The Records of the Federal Convention of 1787, at 534 (Max Farrand ed. 1937) ("One great objt. of Govt. is personal protection and the security of Property." (Alexander Hamilton)); 6 The Works of John Adams, at 280 (Charles Francis Adams ed. 1851) ("Property must be secured or liberty cannot exist." (John Adams)); *see also* James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights, at 13 (2d ed. 1998) ("[C]olonial leaders viewed the security of property as the principal function of government.").

The Fourth Amendment serves that end. *See Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992) ("[T]he Amendment protects property as well as pri-

vacy."). Although this Court's seizure cases have principally involved seizures of persons, *see, e.g.*, *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Fourth Amendment also explicitly protects against unreasonable seizures of a person's "houses, papers, and effects," U.S. Const. amdt. 4. A seizure of property occurs when "there is some meaningful interference with an individual's possessory interests"—"however brief" the interference may be. *United States v. Jacobsen*, 466 U.S. 109, 113 & n.5 (1984). The standard turns not on privacy, but on the possessory interests of the person in lawful possession or control of the property. Government conduct that does not "compromise any privacy interest" may nonetheless be "deemed an unlawful seizure." *Soldal*, 506 U.S. at 63.

2. *The Right To Exclude Others From One's Property Is A Possessory Interest Protected By The Fourth Amendment*

As noted, *supra* I.A.1., "[o]ne of the main rights" that belong to a person who "lawfully possesses or controls property" is "the right to exclude others." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (citing W. Blackstone, Commentaries, Book 2, ch. 1). Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *accord Kaiser Aetna v. United States*, 444 U.S. 164, 180 n.11 (1979) ("An essential element of individual property is the legal right to exclude others from enjoying it." (citation and internal quotation

marks omitted)). It is perhaps the "*sine qua non*" of property: "Deny someone the exclusion right and they do not have property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998).

Moreover, this Court has recognized that the right to exclude is a possessory interest. *See Loretto*, 458 U.S. at 435 (the "power to exclude" and the "right to possess" are two sides of the same general right of possession). The ordinary meaning of the phrase "possessory interests" is "[t]he present right to control property, *including the right to exclude others*." Black's Law Dictionary 1284 (9th ed. 2009) (emphasis added); *accord* Restatement (First) of Property Div. V, Pt. I, Introductory Note (1944) ("The presence or absence of the privilege of exclusive occupation marks the dividing line between possessory and nonpossessory interests."). Several state high courts have so recognized. *See, e.g.*, *Bell v. Town of Wells*, 557 A.2d 168, 178 (Me. 1989) ("'If a possessory interest in real property has any meaning at all it must include the general right to exclude others.'" (quoting *Opinion of the Justices*, 313 N.E.2d 561, 690 (Mass. 1974))); *Opinion of the Justices*, 649 A.2d 604, 611 (N.H. 1994) (same).

3. *The Government's Installation Of The GPS Device Was A Meaningful Interference With Jones's Possessory Interest In His Vehicle*

By installing a GPS device onto Jones's vehicle without his knowledge or consent, the government committed a seizure.

a. The government's physical intrusion upon Jones's vehicle interfered with his possessory interest in his property. Jones had a possessory right not only to use the vehicle for his own purposes, but also to exclude all others from using it. Unless the police have complied with the Fourth Amendment's requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Kleinfeld, J., concurring in the judgment).

This interference with Jones's right to exclude was meaningful. As explained *supra* I.A.1., there is no historical or socially accepted practice of installing GPS devices onto others' cars; indeed, a private individual's surreptitious use of a GPS device against another would constitute trespass to chattels and possibly even criminal conduct. Jones therefore had no reason to believe that law enforcement officers would surreptitiously install such a device onto his vehicle. He used his property in the reasonable assumption that his right to exclude would *not* be infringed in that manner. The installation was therefore fundamentally different from other types of minor trespasses that occasionally occur and that are widely accepted as insignificant—*e.g.*, resting a hand on someone else's car, or placing a flyer or pamphlet on the car's windshield. The installation was meaningful because "the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free." *Karo*, 468 U.S. at 729 (Stevens, J., concurring in part and dissenting in part).

b. The government responds that its installation was not a seizure because the vehicle was not damaged or destroyed. But it is possible to meaningfully interfere with possessory interests without damaging or destroying property; the government could, for instance, meaningfully interfere by affixing an odious political bumper sticker, an unwelcome religious symbol, or a commercial advertisement. And modern electronic, computer-based, and space-age technologies enable the government to meaningfully interfere with an individual's possessory right to exclude in additional, unprecedented ways. For instance, the government could easily attach bugging technology to a person's vehicle—or briefcase, purse, or even clothing—in order to record a person's conversations throughout the day. Modern cybersurveillance technologies make it possible to access a person's computer without any "physical" intrusion at all. *See Register.com v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (finding a trespass to chattels in light of defendant's "use of search robots, consisting of software programs performing multiple automated successive queries"). In these and many other ways, the government's ability to interfere with possessory interests has dramatically expanded with the development of modern technologies.

In applying the Fourth Amendment's protections against searches, the Court has "take[n] the long view, from the original meaning of the Fourth Amendment forward." *Kyllo*, 533 U.S. at 40. That approach is no less appropriate when applying the Fourth Amendment's protections against seizures.

And that approach requires a finding that the government committed a seizure in this case.

c. The government warns that if the installation of a GPS device is a seizure, then marking a chalk "X" on the wheel of a vehicle to assist with the administration of parking laws must also be a seizure. *See* Pet. Br. 44. This warning rings hollow. Although chalk markings would constitute a technical trespass to chattels, they would not be a *meaningful* interference with the right to exclude. They appear in plain sight and are easily erased. And they are indistinguishable from the kinds of physical intrusions that a property owner regularly encounters; any child playing hopscotch can leave chalk marks behind. For these reasons, chalk marks are simply not comparable to the installation of a GPS device. Indeed, given the power and dangers of satellite-based GPS technology—and the government's repeated assurances that it will make responsible use of the technology if freed from all Fourth Amendment constraints—it is deeply troubling that the government compares the technology to a marking of chalk.

Nor would other run-of-the-mill physical contact amount to Fourth Amendment seizures if the Court holds that installation of a GPS tracker is a seizure. An interference with a possessory interest must be not only meaningful, but also purposeful; "the Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct." *See Brower*, 489 U.S. at 596 (citation and internal quotation marks omitted). This limitation ensures that the Fourth Amendment's safeguards

apply only to meaningful, purposeful interferences with the right to exclude.

Moreover, even when the government has committed a seizure, exclusion of evidence is an appropriate remedy only if "the evidence to which instant objection is made has been come at by exploitation of that illegality," rather than "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (citation and internal quotation marks omitted). For example, a police officer who steals binoculars to watch their owner commit a crime has seized the binoculars, but the evidence of the crime should not be excluded. The fact that the binoculars belonged to the assailant, and not to someone else or even the government, was mere happenstance, and the government's observations are "sufficiently distinguishable to be purged of the primary taint." *Id.*; *see also Hudson v. Michigan*, 547 U.S. 586 (2006) (exclusion is not appropriate "when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained"). In this case, by contrast, exclusion is appropriate and necessary because the seizure of Jones's vehicle was an integral feature of the government's chosen means of obtaining evidence; the government affixed the device to Jones's vehicle precisely because no other vehicle would have allowed it to capture and store satellite-generated movement and location data about Jones.

B. The Government Engaged In An Additional Fourth Amendment Seizure When It Used The GPS Device To Record Data About Jones's Locations And Movements

The government committed a Fourth Amendment seizure not only when it attached the GPS device to Jones's car, *see supra* II.A., but also when it later used the device to generate and store a permanent record of GPS data about Jones's movements and locations over the course of four weeks.

1. "[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording" of intangible items, including "oral statements, overheard without any technical trespass under ... local property law." *Katz*, 389 U.S. at 353 (citation and internal quotation marks omitted); *see also Berger v. New York*, 388 U.S. 41, 52 (1967).

In this case, the government was able to collect over 2,000 pages worth of intangible data only by usurping Jones's private vehicle and converting it into a GPS transmitter at the government's service. As a consequence, Jones possessed a Fourth Amendment interest in the GPS data his vehicle produced, and the use of sophisticated technology to surreptitiously record that data was a seizure. "From the standpoint of regulating the government's power to collect and use evidence, generating an electronic copy [of computer data] is not substantially different from controlling access to a house or making an arrest. Each of these seizures ensures that the government has control over the person, place, or thing that it suspects has evidentiary val-

ue." Kerr, *supra*, at 709. That is what happened here. The government usurped Jones's vehicle to generate GPS data about his pattern of movements and then took control of—and thus seized—that data.

2. *Arizona v. Hicks*, 480 U.S. 321 (1987), does not require a different result. The Court there established that "[w]riting down information or taking a photograph [that] merely preserves the human observation in a fixed form" is not a seizure. Kerr, *supra*, at 714 (citing *Hicks*, 480 U.S. at 324). But electronic recording of non-observable data is different. Although writing down notes—or making an audiotape of a confession—is used to "minimize loss" and "avoid forgetting," the electronic recording of non-observable data "adds to [the evidence] the government controls ... [and] thus provides the opportunity for the government to use its search powers to collect evidence and then use it against a suspect." *Id.* at 715; *see also* LaFave, *supra*, at § 26(f) (endorsing this analysis). Here, the government's creation and storage of GPS data "add[ed] to the information in the government's possession by copying that which the government ha[d] not observed." The data were seized.

III. THE GOVERNMENT WAS REQUIRED TO OBTAIN A VALID WARRANT

As an alternative argument, the government contends that if its conduct constituted a Fourth Amendment search or seizure, it should not have to obtain a valid warrant or show probable cause.

A. The government makes this argument for the first time in this Court. It failed to stake out an evidentiary basis for this argument in the lower courts—indeed, it failed even to raise the argument, and simply conceded that the GPS warrant was invalid—and the D.C. Circuit had no occasion to consider it. *See* Pet. App. 44a; Pet. Br. 48 n.7 (acknowledging that "the government did not raise this argument below"). Although the government now suggests that its *ex parte* warrant applications might provide sufficient evidence, this fact-bound argument has not been tested in the lower courts. It should not be considered for the first time now. *See Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) ("[W]e are a court of review, not of first view." (citation and internal quotation marks omitted)).

Nor does the government gain any support from this Court's decision in *United States v. Knights*, 534 U.S. 112, 118-121 (2001). It is true that *Knights* "upheld the search of a probationer's house on grounds of reasonable suspicion, even though the court of appeals had not addressed a reasonable-suspicion argument." Pet. Br. 48 n.7. But that is only because the district court found that reasonable suspicion existed, and the respondent in *Knights* explicitly *conceded* that the finding was correct. 534 U.S. at 122. In this case, a district judge initially approved the government's warrant application, but he did so *ex parte* and outside the record of this criminal proceeding. The district judge who presided over Jones's trial herself made no finding that the installation of the GPS device was supported by reasonable suspicion or probable cause. *See* Pet. App.

83a-84a (noting, but not resolving, Jones's argument that the government "lacked probable cause to believe that his vehicle was in any manner being used for criminal activity," because the government the warrant was invalid and "contend[ed] that the placement of the GPS device was proper" without a warrant (citation and internal quotation marks omitted)). And Jones has not conceded that it was.

B. If the Court nonetheless decides to consider whether a reasonable-suspicion standard is the appropriate one, it should conclude that it is not.

1. The government's argument for a generalized exception to the warrant requirement is "based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant." *Karo*, 468 U.S. at 717. But far from an antiquated burden on effective police work, the warrant requirement is a separation-of-powers device that is essential to the Fourth Amendment's implementation. "Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States Dist. Court*, 407 U.S. at 318. It "accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *Id.* at 317. As Justice Jackson explained, "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence"; rather, its "protection consists in requiring that those inferences be drawn by

a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

This Court has not created exceptions to the warrant requirement lightly. And it has not done so through simple "balancing test[s]," such as the one proposed by the government. Pet. Br. 50. To the contrary, it has recognized that a "generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006). "The warrant requirement ... is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge*, 403 U.S. at 481. Although there exist well-established exceptions for cases implicating safety or evidentiary concerns, *see Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009), exceptions have been "few in number and carefully delineated," *United States Dist. Court*, 407 U.S. at 318. The government does not argue that it qualifies for an exception here.[9]

2. a. The government argues not only for a generalized exception from the warrant requirement for GPS searches and seizures, but also an exception from the probable-cause standard. According to the government, a reasonable-suspicion standard would be more appropriate. But there is no basis for an exception to the warrant requirement in this case, and therefore the text of the Fourth Amendment pre-

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[9] It attempted to rely on the automobile exception in the court of appeals, *see* Pet. App. 44a; *see also supra* p.9, but has not argued for that exception in this Court.

cludes a reasonable-suspicion standard. *See* U.S. Const. amdt. 4 ("No warrant shall issue except on probable cause.").

The government's argument for a reasonable-suspicion standard is also premised on two mistaken assumptions. First, the government assumes that if GPS monitoring is a search or seizure, it is a minor one. Pet. Br. 49-50. This assumption is wrong. As discussed, surreptitious GPS monitoring violates core property rights, and resembles conduct that is not only unlawful but potentially criminal if performed by private individuals. The technology can easily generate "an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse." Pet. App. 33a. And use of the technology without a warrant and probable cause raises the specter of perpetual surveillance of an individual for the entirety of her lifetime, and even mass surveillance of entire political associations or communities.

Second, the government wrongly assumes that a reasonable-suspicion standard is justified by its mere assertion that GPS tracking would increase law enforcement efficiency. Pet. Br. 50-51. But the government exaggerates the likely efficiency gains. As the government acknowledged in *Karo*, "for all practical purposes [it] will be forced to obtain warrants in every case ..., because [it] have no way of knowing in advance whether the [GPS device] will [generate data] from inside private premises." 468 U.S. at 718. This case proves the point: the GPS device generated data while in Jones's garage, *see supra* p.5, and the government presumably applied for a warrant in anticipation of this very problem.

The government's efficiency argument also overlooks that this Court's cases have departed from the warrant requirement and probable-cause standard only when special circumstances, distinct from the general interest in law enforcement, justify the departure. Thus, the Court has allowed warrantless searches and seizures on less than probable cause in "special needs" cases involving parolees, *Samson v. California*, 547 U.S. 843 (2006), border searches, *United States v. Flores-Montano*, 541 U.S. 149 (2004), schools, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002), and administrative inspections in closely regulated industries, *New York v. Burger*, 482 U.S. 691 (1987); cases raising imminent safety concerns, *Arizona v. Johnson*, 555 U.S. 323 (2009); *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); and cases involving programmatic searches designed to further an objective distinct from law enforcement, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (checkpoint designed to remove inebriated drivers from the road). No special circumstances distinct from general law enforcement interests are present in this case; the government seeks a categorical exception from the warrant requirement merely to facilitate law enforcement.[10]

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[10] In particular, the government argues that it sometimes needs GPS to establish probable cause. Pet. Br. 50. But the same could be said of all investigative tools, including wiretaps, thermal imaging devices, and searches of homes. "The argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement." *Karo*, 468 U.S. at 718.

Furthermore, the government cites no case in which a reasonable-suspicion standard was ever applied to prolonged and surreptitious searches or seizures. The Court should not do so here. "[T]he right to be secure against searches and seizures is one of the most difficult to protect." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). It would be all the more difficult to protect if the government were free to engage in surreptitious GPS monitoring without first persuading a neutral magistrate that a search or seizure is justified. And a reasonable-suspicion standard would be particularly unworkable here because the government is not currently required to preserve a contemporary record of its reasons for warrantless GPS monitoring. Even if a record were preserved, innocent targets of GPS surveillance might never learn that their Fourth Amendment rights were violated. And the 765,000 state and local law enforcement officers and 105,000 federal officers across the nation—and innumerable non-law-enforcement employees—will occasionally err. Moreover, "the authority which [this Court] concede[s] to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible." *Id.*

* * * *

The government's GPS monitoring was a search and seizure. And it was unreasonable without a warrant. Even when the warrant requirement imposes an "added burden" on the government, "this inconvenience is justified in a free society to protect constitutional values." *U.S. Dist. Ct.*, 407 U.S. at

321. "By no means of least importance will be the reassurance of the public generally that indiscriminate [GPS surveillance] of law-abiding citizens cannot occur." *Id.*

CONCLUSION

For the foregoing reasons, the court of appeals's judgment should be affirmed.

Respectfully submitted,

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September 26, 2011

REPLY BRIEF

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 10-1259

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON WRIT OF CERTIORARI
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REPLY BRIEF FOR THE UNITED STATES

Respondent's central contention is that GPS surveillance of a vehicle's public movements for *any* period of time amounts to a Fourth Amendment search. Br. 10. That position—which is far broader than the court of appeals' holding—fails. Although GPS technology is more advanced than the beeper technology used to follow a vehicle in *United States* v. *Knotts*, 460 U.S. 276 (1983), it reveals the same type of information—the movements of a car on "public thoroughfares"—in which *Knotts* held that a person has "no reasonable expectation of privacy." *Id.* at 281. And respondent's backup argument (Br. 12-13)—that installation and use of the GPS monitor is a "seizure"—cannot be reconciled with *United States* v. *Karo*, 468 U.S. 705, 712-713 (1984), which found no "meaningful interference with" an indi-

vidual's property interests despite a beeper's "technical trespass" in an item the individual owned.

Under this Court's Fourth Amendment precedent, the GPS monitoring in this case was neither a search nor a seizure. The Court should not expand those doctrines to prohibit the government from acquiring information "knowingly expose[d] to the public," *Katz* v. *United States*, 389 U.S. 347, 351 (1967), based on hypothetical concerns arising from "emerging technology." *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2629 (2010). If society deems such limitations warranted, it may impose them through the legislative process—as it has in other contexts. And, in any event, if the Court determines that GPS monitoring of a vehicle in public spaces implicated the Fourth Amendment, the activities here, based on individualized suspicion, were constitutionally valid.

A. Respondent's Contention That Any Period Of GPS Tracking Constitutes A Search Conflicts With *Knotts*

Respondent barely defends the court of appeals' "mosaic" approach to the Fourth Amendment. Pet. App. 29a. Instead, respondent contends (Br. 14-30) that a search occurs in GPS monitoring of a vehicle's public movements for *any* period of time. But *Knotts* held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," and it therefore rejected a claim that beeper monitoring constituted a "search." 460 U.S. at 281-282.

Respondent contends (Br. 16-30) that GPS technology is different from beepers in ways that transform its use into a search. See also Yale Law Sch. Info. Soc. Project Scholars *et. al.* Amicus Br. (Yale Amicus Br.) 20-28; Center for Democracy & Tech. *et al.* Amicus Br. 16-22.

According to respondent, GPS surveillance: (1) involves physical contact with his property (Br. 16-24); (2) poses unique dangers to privacy because of its low cost (Br. 24-28); and (3) records data that is "different from what the human eye observes" (Br. 28-30). Even if true, those characteristics do not create a legitimate expectation of privacy in the movements of vehicles on public roads.

1. Physical placement of a GPS device on a vehicle does not transform GPS surveillance into a search

a. Respondent contends (Br. 16-17) that the "unauthorized physical intrusion" in placing a GPS device on his vehicle is a "feature of * * * GPS surveillance" that gives rise to reasonable "privacy expectations."

i. Respondent relies primarily on *Silverman* v. *United States*, 365 U.S. 505 (1961), in which the Court found a Fourth Amendment violation when officers heard conversations inside a row house by inserting a "spike mike" under the baseboard of an adjoining house to contact the defendants' heating duct. *Id.* at 506-507. The Court reasoned that "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by [the defendants]." *Id.* at 509. The Court distinguished (*id.* at 510-512) the non-invasive surveillance of conversations through a detectaphone touching the wall of an adjoining office, held not a search in *Goldman* v. *United States*, 316 U.S. 129 (1942).

Silverman relied on a "physical encroachment" concept (365 U.S. at 510) that the Court repudiated in *Katz*. *Katz* held that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 352-353; see also *Kyllo* v. *United States*, 533 U.S. 27, 32 (2001)

("We have * * * decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."); *Karo*, 468 U.S. at 712-713 ("physical trespass" "is neither necessary nor sufficient to establish a constitutional violation").

ii. Respondent incorrectly contends (Br. 19 & n.2) that, although a physical trespass is no longer necessary for a Fourth Amendment search, *Silverman* still means that if the government "usurps" property to obtain evidence, "its conduct is more likely to be a search." The relevant question under *Katz* is whether the individual has a reasonable expectation of privacy in the information the government acquires, and for information "knowingly expose[d] to the public," the answer is that he does not. 389 U.S. at 351. Physical contact may be relevant to the "search" inquiry when the contact is used to obtain information otherwise kept private, as with the "spike mike" in *Silverman*, 365 U.S. at 511, or the "physical manipulation" of a bus passenger's bag in *Bond* v. *United States*, 529 U.S. 334, 337-339 (2000). But when the contact does not reveal private information, it does not convert observations into a search.

In *Karo*, the installation of a beeper in a canister of chemicals transferred to the defendant was not a search because the placement of the device "conveyed no information that [the defendant] wished to keep private." 468 U.S. at 712. Likewise in *Knotts*, the Court attached no significance to the physical presence of the beeper on respondent's can, instead the Court focused on what the beeper revealed: a driver's location on public roads accessible "to anyone who wanted to look." 460 U.S. at 281.

Respondent attempts to distinguish (Br. 35-36) *Karo* and *Knotts* by noting that the physical intrusion in those

cases was not "unauthorized" because the beepers were installed with the consent of the cans' initial owners before the cans were transferred to the defendants. See also Constitution Project Amicus Br. 14-15. That distinction has no constitutional significance. Once a hidden monitoring device is installed, its presence is just as much an "unauthorized" intrusion on a later owner's property interests as an initial covert installation. *Karo* found that intrusion irrelevant, because the electronic device itself neither invaded privacy interests nor "interfered * * * in a meaningful way" with "anyone's possessory interest[s]." 468 U.S. at 712. The relevant issue for the Court was the informational value of the device and its impact on privacy—issues unaffected by property questions.

b. Respondent incorrectly contends (Br. 11, 31-35) that the government argues that *only* "technological intrusions into *private places* can infringe a legitimate expectation of privacy." Br. 31 (quoting U.S. Br. 22) (emphasis added by respondent). That is not the government's position; that position would contradict *Katz*, on which the government relies. U.S. Br. 17-18.[1] Rather, the government's position is that "a person has no reasonable expectation of privacy in *information* that is exposed to public view." *Id.* at 18 (emphasis added); see also *id.* at 19 ("The Fourth Amendment does not preclude the government from using technology to collect information that is in public view, because the technology does not make the information collected any less public.").

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[1] Although respondent critiques (Br. 34) the government's use of ellipses, this Court has used them identically in quoting *Katz*. *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985); *United States* v. *Miller*, 425 U.S. 435, 442 (1976).

c. Respondent further contends (Br. 20 & n.3) that the government infringed his reasonable expectation of privacy because a private individual could not have placed a GPS device on his vehicle without committing a trespass to chattels or perhaps a state law stalking crime. That comparison is inapposite.

i. A trespass to chattels does not constitute a search unless it infringes a reasonable expectation of privacy. See *New York* v. *Class*, 475 U.S. 106, 114 (1986) (an officer's reaching inside a vehicle to move papers that obscured the VIN number on the dash board was not a search; the VIN's mandated visibility made it similar to the exterior of the car, in which the defendant had no reasonable expectation of privacy); *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (plurality) (officers examined a car's wheel and took paint scrapings from it; "we fail to comprehend what expectation of privacy was infringed"). Because respondent, like the defendants in those cases, had no reasonable expectation of privacy in the exterior of his vehicle (see U.S. Br. 39-41), the law of trespass does not assist him.

ii. Respondent also relies on (Br. 20 n.3) state stalking convictions of private individuals who placed GPS devices on other peoples' cars to establish a purported reasonable expectation of privacy from law enforcement GPS surveillance. But those crimes require following a victim in order to intimidate her, which is not the case here.[2] Police do not use GPS surveillance to intimidate

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[2] See Resp. Br. 20 n. 3 (citing, *e.g.*, *People* v. *Sullivan*, 53 P.3d 1181, 1184 (Colo. App. 2002) (noting that defendant told wife he "was aware of where she went and what she did," demonstrating his "motive to instill fear in his victim"); *L.A.V.H.* v. *R.J.V.H.*, No. CN08-05322, 2011 WL 3477016, at *4 (N.J. Super. Ct. App. Div. Aug. 10, 2011) (noting that stalking involves engaging in a course of conduct "that would cause a

suspects. To the contrary, police hope to conduct GPS surveillance without being detected.

More fundamentally, this Court has never looked to whether a private individual would or could conduct comparable surveillance to determine whether the government's collection of information in public view infringes a reasonable expectation of privacy. The police routinely investigate in ways private citizens would not or could not do, such as conducting extended around-the-clock visual surveillance, reviewing a suspect's bank records, installing a pen register on his phone, or examining his trash. Although private individuals may be accused of stalking if they engaged in such activities, the police might do so without implicating the Fourth Amendment. See *Karo*, 468 U.S. at 721; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Smith* v. *Maryland*, 442 U.S. 735, 745-746 (1979); *California* v. *Greenwood*, 486 U.S. 35, 44-45 (1988).

Nor does the existence of three state laws prohibiting warrantless GPS surveillance by law enforcement officers suggest that respondent had a reasonable expectation of privacy. Resp. Br. 22 n.4. State laws do not create a reasonable expectation of privacy under the Fourth Amendment. *Greenwood*, 486 U.S. at 43-44 (state law prohibited searching garbage; this Court found no Fourth Amendment search); see also *Quon*, 130 S. Ct. at 2632 (finding no authority for the proposition that a "statutory protection renders a search *per se* unreasonable"); *Virginia* v. *Moore*, 553 U.S. 164, 173 (2008) ("[W]hen States go above the Fourth Amendment minimum, the Constitution's protections concerning

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reasonable person to fear for he[r] safety"); *M.M.* v. *J.B.*, No. A-6292-09T4, 2010 WL 1200329, at *2 (Del. Fam. Ct. Jan. 12, 2010) (same)).

search and seizure remain the same."); *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 232 (1986) ("State tort law governing unfair competition does not define the limits of the Fourth Amendment."); *Oliver* v. *United States*, 466 U.S. 170, 183-184 & n.15 (1984) (officers who trespassed on private land did not violate the Fourth Amendment).

2. The efficiency of GPS technology and its potential for widespread use does not transform GPS surveillance into a search

Respondent further contends (Br. 24-28) that the efficient potential use of GPS technology for prolonged monitoring of citizens "supports the reasonableness of [his] privacy expectations." But respondent never explains how GPS's potential to capture "innocent information" (Br. 25) gives him a reasonable expectation of privacy in the public movements of his vehicle. And the Court should not alter its Fourth Amendment framework to guard against potential future applications of GPS technology to others.

a. This Court has made clear that "Fourth Amendment cases must be decided on the facts of each case," *Dow Chem. Co.*, 476 U.S. at 238 n.5, and the established reasonable-expectation-of-privacy analysis should not be expanded to protect against hypothetical misuses of technology. See *Knotts*, 460 U.S. at 283-284 (reserving constitutional judgment on "such dragnet-type law enforcement practices as respondent envisions" if they "should eventually occur"); see also *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978) (observing that very few instances had been cited "involving the issuance of warrants for searching newspaper premises," and stating that "if abuse occurs, there will be time enough to deal

with it"). The agents in this case tracked the movements of a single vehicle driven on public streets by an individual suspected of trafficking in cocaine. Pet. App. 2a, 54a. That was a proper use of GPS technology, and it presents no occasion for revamping established doctrine to invent an expectation of privacy in the movements of a car on a public street.

b. In support of his claim that GPS surveillance of a car is intrusive, respondent notes (Br. 26) that his car's GPS device transmitted data while the car was parked in his closed garage. Although the district court excluded data transmitted while the vehicle was parked in the garage, Pet. App. 83a-85a, that data did not infringe his privacy expectations. The vehicle entered the garage in public view, and the GPS device revealed nothing that the officers did not already know. That fact distinguishes GPS surveillance of a vehicle from GPS surveillance using personal effects like clothing, a briefcase, or a purse. See Resp. Br. 24. Under *Karo*, a warrant would be required before police could conduct GPS surveillance using a personal effect that would be carried into private places and that would disclose its location within them. 468 U.S. at 714 (holding that "monitoring of a beeper in a private residence, a location not open to visual surveillance," violates the Fourth Amendment). GPS surveillance of a car does not do that.

Respondent also asserts (Br. 3, 39-40) that abuse of GPS technology is occurring, relying on various articles. The articles provide no details about the basis for GPS surveillance of two specific individuals and fall far short of demonstrating abuse. Respondent also refers to a congressional inquiry into cell-phone tracking by intelligence agencies, but that does not establish law enforcement abuse of GPS. It is no surprise that so few indica-

tions of purported abuse have surfaced. Scarce law enforcement resources are focused on realistic threats. And the use of GPS monitoring today is not nearly as simple or low cost as respondent assumes.[3]

c. But even if the Court were to take the "long view," *Kyllo*, 533 U.S. at 40, and imagine ways in which GPS technology could be more widely used in the future, the possibility of mass collection of GPS data is not a reason to find a constitutional privacy protection for respondent. Respondent suggests (Br. 27) that unless constrained by the Fourth Amendment, law enforcement will be encouraged to widely and indiscriminately use low-cost GPS technology and could conduct suspicionless surveillance of "networks of individuals and even entire neighborhoods, towns, or cities." Speculation that government would collect GPS information just to monitor its citizens should not justify a new constitutional analysis with unforeseeable implications. For example, under respondent's approach, roadside cameras that capture and store images of drivers or pedestrians, or computers that synthesize data from E-Zpass systems, might become Fourth Amendment searches. Unlike

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[3] As the record below reveals (J.A. 93-100), GPS surveillance requires an investment of police resources to install the device while the vehicle is in a public area and the suspect is away from it. The same level of coordination is required any time the battery needs to be replaced. J.A. 110-112, 129-132, 144-146. Although GPS observations are more efficient than visual surveillance, the resource drain in placing devices in every vehicle in a city or town, as respondent posits (Br. 27), makes such scattershot activity unrealistic. And visual, warrantless surveillance is often superior to the information returned by GPS devices. For example, officers could determine who was driving the vehicle, who was a passenger in the vehicle, and whether any passengers or items were loaded or unloaded at any given stop the vehicle made.

Kyllo, which involved protection of privacy at one's home—the "very core" of the Fourth Amendment (533 U.S. at 31)—this case involves travel on public streets, which has never been deemed a private activity. The Court should hesitate before altering settled principles to accommodate hypothetical scenarios that may never come to pass. See *Quon*, 130 S. Ct. at 2629 ("Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations.").

d. Respondent further contends (Br. 25) that even when a GPS device is used to investigate an individual suspect, it infringes privacy interests because the device produces "broad swaths of innocent information." That does not distinguish GPS surveillance from any of a wide variety of non-search investigative techniques that produce a large volume of innocent information about citizens without implicating the Fourth Amendment. For example, officers may follow individuals on foot or in vehicles, use a beeper to track items they are transporting in cars, install pen registers on their telephones, review their bank records, or repeatedly look through their trash. As long as the information police acquire is exposed to public view, police infringe no reasonable expectation of privacy when they acquire "broad swaths" of it.

All of those examples of non-search techniques are conducted outside of public view, yet the Court saw no need to alter its Fourth Amendment doctrine to impose novel constraints. Accordingly, respondent's suggestion (Br. 26) that police will expand their use of GPS without fear of accountability because GPS surveillance is surreptitious and not subject to public scrutiny is unfounded. And when the government secures a conviction

based on evidence from GPS, that fact will be of public record.

e. Finally, there is no reason to believe that the Orwellian scenarios respondent describes would come to pass "unless [GPS monitoring on public streets is] constrained by the Fourth Amendment." Resp. Br. 27. The Fourth Amendment protects against unreasonable searches and seizures, and the monitoring of a vehicle's public movements does not fall within this Court's longstanding interpretations of those terms. But other constitutional constraints—notably the First Amendment's protection of free speech and assembly, and the Fifth and Fourteenth Amendments' guarantee of equal protection—guard against invidious harassment and suppression of political dissent. The Fourth Amendment need not be altered to safeguard those values. See *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

Beyond those protections, if society deems measures necessary or appropriate to guard against the collection of public information using a GPS device, that protection should be afforded through the legislative process, not through novel expansion of search and seizure doctrine. If GPS surveillance could affect everyone, the political process is well-suited to address it. Through legislation, citizens have limited the government's access to pen register data and bank records, even though this Court held in *Smith* v. *Maryland*, *supra*, and *United States* v. *Miller*, *supra*, that obtaining those types of information does not amount to a search or seizure under the Fourth Amendment. See U.S. Br. 35-36. If similar restrictions are to be placed on the collection of public information

obtained through GPS devices, those restrictions should likewise be imposed through the legislative process.

3. The form of data produced by a GPS device does not transform GPS surveillance into a search

The third characteristic of GPS surveillance that respondent asserts (Br. 28-30) contributes to his reasonable expectation of privacy in his vehicle's public movements is that GPS produces a form of evidence that is "different from what the human eye observes." He singles out GPS's production of "longitudinal and latitudinal positions," which differs "in both form and quality from the evidence that can be obtained through visual surveillance." See also Center for Democracy & Tech. *et al.* Amicus Br. 26-31; Yale Amicus Br. 17-18. That characteristic does not distinguish GPS from other devices that are used to acquire public information.

The accuracy with which a GPS device can track a vehicle's movements and transmit it to a computer for recording of data differs very little from the accuracy and permanent record-keeping capabilities of a pen register. A pen register allows the capture of every telephone number called, records the exact time at which the call was placed, and makes a permanent record of that data. Although no police officer observes all (or any) of that information through visual surveillance, those technological capabilities were irrelevant to the Fourth Amendment analysis in *Smith* v. *Maryland*, *supra*.

The Court has also held that the compelled taking of a voice exemplar does not implicate the Fourth Amendment because a person has no reasonable expectation of privacy in the sound of his voice, which is "repeatedly produced for others to hear." *United States* v. *Dionisio*,

410 U.S. 1, 14 (1973). That practice involves "transferring a recorded voice to a machine, called a sound spectrograph, that transforms the sounds on tape into electrical coordinates" that "manifest themselves as different shadings on paper." *United States* v. *Smith*, 869 F.2d 348, 353 n.9 (7th Cir. 1989). Similar to the data produced through a pen register or a spectrograph, the locational data collected by a GPS device does not infringe a reasonable expectation of privacy simply because the data is accurate and can be transferred to a computer and displayed on an interactive map.

While the means through which information is collected is relevant to identifying a search, see *Kyllo*, 533 U.S. at 35 n.2, the line between augmentation of the senses (acceptable, see *Knotts*, 460 U.S. at 282; Resp. Br. 37) versus "wholly automated" and "superhuman" acquisition of information, see Center for Democracy & Tech. *et al.* Amicus Br. 25; Yale Amicus Br. 17-18, has no meaningful application here. When information placed in the public domain is acquired with a technological assist, the public-exposure principle of *Katz* controls. Accordingly, the acquisition of public information about respondent's movements using GPS technology instead of the human eye lacks constitutional significance. Respondent had no reasonable expectation of privacy in his movements on public streets.

B. Prolonged GPS Surveillance Does Not Constitute A Fourth Amendment Search

Respondent briefly defends (Br. 42-45) the court of appeals' holding that even if GPS surveillance does not always constitute a search, it becomes a search when it is conducted for "prolonged periods." That "mosaic"

standard is not sensible, workable, or consistent with precedent.

1. Respondent contends (Br. 43) that prolonged GPS monitoring infringes a reasonable expectation of privacy because visual surveillance of the same length without the assistance of a GPS device would be "practically impossible." Under that approach, the police would conduct a search whenever they use technology to collect public information that they might not be able to acquire without the technology because of time, resource, or practical constraints. But even the surveillance in *Knotts* would have amounted to a search under that formulation; the Court acknowledged that because of the "failure of visual surveillance," the officers "would not have been able to [locate the destination of the chloroform] had they relied solely on their naked eyes." 460 U.S. at 285.

Respondent's test of "practical impossibility" also would tie reasonable expectations of privacy to varying factors that have nothing to do with an individual's legitimate expectations. The practical feasibility of visual surveillance in any given case depends on the importance of the target and the resources of the law enforcement agency conducting the surveillance. For example, agents from the FBI followed terrorism suspect Najibullah Zazi as he drove 1800 miles from Denver to New York, often reaching speeds of up to 100 miles per hour. See David Johnston & William Rashbaum, *Rush for Clues Before Charges In Terror Case*, N.Y. Times, Oct. 1, 2009, at A1, A30. An individual's reasonable expectation of privacy cannot vary based on the specific resources and capabilities of the law enforcement agency conducting an investigation.

2. Respondent further contends (Br. 43-44) that prolonged GPS surveillance infringes a reasonable expectation of privacy by potentially revealing patterns of movements. See also Yale Amicus Br. 22-27. But a pattern-based test could invalidate a variety of common non-search law-enforcement practices; combining pen registers from multiple locations, for example, could generate enormously revealing patterns. Respondent argues (Br. 44) that GPS surveillance differs from other investigatory techniques because it is a "uniquely intrusive means" of observing patterns. But GPS surveillance of the public movements of a vehicle is no more intrusive than following a person through the streets, reviewing his bank records, or sifting through his trash—all techniques held not to be searches.

3. Finally, respondent acknowledges (Br. 45) that the court of appeals' holding requiring a warrant before police may engage in "prolonged" GPS monitoring would be workable only if this Court arbitrarily defined what period of time would be sufficiently "prolonged." Respondent suggests (*ibid.*) that it would be "reasonable" to hold that GPS surveillance "for longer than a day" is a search.

Adopting that short a time period would be wholly inconsistent with every court of appeals to have determined that GPS surveillance of a vehicle did not amount to a search.[4] It would also conflict with this Court's deci-

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[4] See, *e.g.*, *United States* v. *Cuevas-Perez*, 640 F.3d 272 (7th Cir. 2011), petition for cert. pending, No. 11-93 (filed July 20, 2011) (holding that 60-hour GPS surveillance of a vehicle as it traveled from Arizona to Illinois was not a search); *United States* v. *Hernandez*, 647 F.3d 216 (5th Cir. 2011) (holding that two-day GPS surveillance of a vehicle was

sion in *Karo*, where officers left a beeper in a can of ether for five months as the can was transported between different locations. 468 U.S. at 708-710. No precedent justifies an arbitrary one-day limit to collection of public information using GPS; if the collection is not a search on day one, it is not a search on days two, three, or four either.[5]

C. Neither Placing The GPS Tracking Device On Respondent's Vehicle Nor Recording Data About Its Public Movements Was A Fourth Amendment Seizure

1. Respondent contends (Br. 45-52) that the installation of the GPS device was a Fourth Amendment seizure because it "meaningfully interfered with [his] possessory interest in excluding others from exploiting or usurping his vehicle." Every court of appeals to have considered this argument has rejected it. U.S. Br. 43-44.

Respondent relies (Br. 49) in part on Justice Stevens's dissent in *Karo*, which asserted that the placement of a beeper in a container of chemicals sufficiently changed "the character of the property" to constitute a

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not a search); *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. pending, No. 10-7515 (filed Nov. 10, 2010) (holding that GPS tracking over a four-month period was not a search).

[5] A one-day GPS rule would be far more arbitrary than the 48-hour presumptive period adopted for a probable-cause determination after a warrantless arrest in *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991), where the Court simply made concrete the accepted requirement of a "prompt" probable-cause determination, or the 14-day break-in-custody rule adopted in *Maryland* v. *Shatzer*, 130 S. Ct. 1213, 1223 (2010), which made manageable a prophylactic constitutional rule established by this Court. Respondent provides no indication whether the one-day rule applies per investigation, or per an individual's life, or for some other period.

seizure. 468 U.S. at 729 (citing *Silverman*, *supra*). The *Karo* majority rejected that argument, however, concluding that "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way." *Id.* at 712. The Court explained that placing the beeper in the can amounted at most to a technical trespass, which was only "marginally relevant" to the Fourth Amendment inquiry. *Id.* at 712-713. The same is true here.

Respondent invokes (Br. 47-48) the common-law conception of property, which features a broad "right to exclude."[6] But to find a Fourth Amendment seizure, the interference with the right to exclude must be "meaningful." See *Karo*, 468 U.S. at 712 (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). The government did not meaningfully interfere with respondent's property rights. While the GPS device was in place, respondent remained free to use his vehicle however he wanted. He went where he wanted, he transported anyone and anything he wanted, and none of the operational systems of the vehicle were affected in any way. Amici suggest that the government asserted *control* over the vehicle by converting it to governmental

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[6] Respondent also cites (Br. 47-48) *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); see also Constitution Project Amicus Br. 11, but *Loretto* is not a Fourth Amendment case. It is an eminent domain case in which the Court held that a "permanent physical occupation" of a building owner's property by a cable company's "direct physical attachment of plates, boxes, wires, bolts, and screws to the building" was a taking of property that required just compensation. 458 U.S. at 435, 438. Even if that test applied, which it does not, officers only temporarily attached a nonintrusive GPS device to the exterior of respondent's vehicle without penetrating or occupying any part of it.

use, Constitution Project Amicus Br. 13, but the government in no way controlled the vehicle. Respondent remained in control; the device simply enabled the government to acquire public information about where the vehicle went. The device worked no more of a seizure than the beeper involved in *Karo*.

2. Respondent further asserts (Br. 53-54) that the government violated the Fourth Amendment by attaching a GPS device to his vehicle, thereby "seizing" "non-observable data" about its movements. Respondent cites no authority for this novel argument, which conflicts with this Court's precedent.

Respondent is wrong that his locational data was not observable. Unlike a conversation in a phone booth or information stored on a personal computer (see Resp. Br. 53-54), the location of respondent's vehicle on public roads was observable. The manner in which GPS records the information does not make locational data private. See pp. 13-14, *supra*.

Moreover, respondent has no more of a possessory right to GPS data about his vehicle than a person would have to the data created and stored by a pen register, see *Smith*, 442 U.S. at 744, or spectrograph data created during voice exemplar, see *Dionisio*, 410 U.S. at 14. This Court has never held that individuals have a possessory right to such data. To the contrary, the Court has long held that the recording of data as to which no expectation of privacy attaches does not implicate the Fourth Amendment. *Arizona* v. *Hicks*, 480 U.S. 321, 324 (1987); *Lopez* v. *United States*, 373 U.S. 427, 439 (1963); see *United States* v. *White*, 401 U.S. 745, 751-753 (1971) (plurality).

D. Even If The Use Of The GPS Device Amounted To A Search Or Seizure, It Was Constitutionally Reasonable

If the Court concludes that GPS surveillance is a search or seizure, it should hold such surveillance reasonable where, as here, it is supported by reasonable suspicion.

1. Respondent contends (Br. 55-56) that this Court could not uphold the search in this case based on reasonable suspicion as it did in *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001), because the defendant in *Knights* had conceded the district court's finding of reasonable suspicion, whereas here the district court judge presiding over respondent's trial did not make an explicit finding of reasonable suspicion or probable cause. The record in this case amply demonstrates reasonable suspicion.

Before trial, respondent raised numerous challenges to the government's investigation, including to text message and wiretap search warrants that were issued shortly before the GPS warrant for respondent's vehicle. The district court reviewed the affidavits supporting those warrants—which were incorporated by reference into the GPS warrant affidavit—and concluded that they established probable cause to believe respondent was a leader in a large-scale cocaine distribution conspiracy. J.A. 21-34; Resp. C.A. App. 350-412; see also Pet. App. 56a-57a, 60a-63a, 66a-69a (describing basis for probable cause). Even leaving aside Judge Friedman's finding of probable cause to issue the GPS warrant, J.A. 31-34, the record is more than sufficient to demonstrate reasonable suspicion for using GPS surveillance.

2. Respondent contends (Br. 57-59) that the Court should not require less than a warrant and probable

cause for GPS surveillance because the Court has typically done so "only when special circumstances, distinct from the general interest in law enforcement, justify the departure." That is incorrect.

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court has recognized, in a variety of situations, that certain law enforcement actions that qualify as Fourth Amendment searches or seizures are nevertheless not so intrusive as to require a warrant or probable cause. *Terry* approved a warrantless stop and frisk based on reasonable suspicion, and the Court has applied that standard in numerous other law enforcement contexts. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325 (1990) (protective sweep incident to arrest); *Michigan* v. *Long*, 463 U.S. 1032 (1983) (weapons search of a car); *United States* v. *Place*, 462 U.S. 696 (1983) (warrantless seizure of personal luggage on the basis of reasonable suspicion to believe that it contained contraband or evidence of a crime). *Place* rejected the contention that, "absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause." *Id.* at 703-704.

3. Under the general Fourth Amendment balancing test that weighs "the degree to which [a search or seizure] intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests," *Samson* v. *California*, 547 U.S. 843, 848 (2006), GPS surveillance is reasonable if conducted based on reasonable suspicion.

GPS surveillance constitutes a limited intrusion, if any, on legitimate privacy interests. The device does not conduct either a visual or aural search of the vehicle onto which it is attached or of any place into which it is

taken, but only provides information about the vehicle's location. See *Quon*, 130 S. Ct. at 2631 (considering "the extent of an expectation" of privacy in assessing a search). Although the government attached a GPS device to respondent's property, that contact, like the placement of a beeper in a canister, amounted at most to a "technical trespass." *Karo*, 468 U.S. at 712. And whatever expectation of privacy one might have on public roadways, it is tempered by the reality that a car "travels public thoroughfares where both its occupants and its contents are in plain view." *Knotts*, 460 U.S. at 281 (citation omitted). Against that limited intrusion must be weighed the interest of law enforcement in investigating leads and tips on drug trafficking, terrorism, and other crimes before those suspicions have ripened into probable cause.[7] If GPS surveillance is deemed a search, the balance should be struck at reasonable suspicion.

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[7] For an example of how GPS surveillance could be used to narrow a pool of suspects in order to prevent a criminal act, see Keith Hodges, FBI Bulletin, *Tracking "Bad Guys" Legal Considerations in Using GPS* (July 2007), http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/FBI-LE-Bulletin-GPS-Tracking-Jul2007.pdf/view (describing hypothetical surveillance of plausible, but unconfirmed, suspects to thwart an obstruction of justice).

CONCLUSION

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 2011

AMICUS CURIAE BRIEF

RECORD
BRIEF

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No. 10-1259

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTOINE JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF THE NATION'S CAPITAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*, including in numerous cases involving the Fourth Amendment. In particular, the ACLU and its members have long been concerned about the impact of new technologies on the constitutional right to privacy. The ACLU of the Nation's Capital is the Washington, D.C. affiliate of the ACLU. It filed an amicus brief in this case before the D.C. Circuit.

STATEMENT OF THE CASE

In the fall of 2005, members of an FBI-D.C. Metropolitan Police Department Safe Streets Task Force sought to track the movements of Antoine Jones in order to gather evidence for an ongoing narcotics investigation. On September 27, 2005, the task force installed a Global Positioning System ("GPS") device on a motor vehicle registered to Jones's wife. J.A. 107, 101. The GPS device remained attached to the car until October 24, 2005. J.A. 109.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party's counsel authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No party or entity other than *amici*, their members, or their counsel, made a monetary contribution to this brief's preparation or submission.

During this twenty-eight day period, the GPS device allowed the task force to pinpoint the location of the car at every moment. It had an antenna that received signals from satellites; the device used these signals to determine its latitude and longitude every ten seconds, accurately pinpointing its location to within 50-100 feet. J.A. 79-80. Members of the task force connected that data to software that plotted the car's location and movements on a map. J.A. 108-109. The software also created a comprehensive record of the car's locations.

Depending on the needs of the investigation, members of the task force sometimes monitored the GPS device live and other times reviewed its stored data. J.A. 107-108. The task force could track the car's individual trips as well as identify patterns in the car's daily routine. For instance, it could note repeated visits to particular locations. Over the 28-day period during which the GPS device was installed, the task force had constant access to the car's location, except during a five-day period after the GPS device's batteries had run out. During this period, task force members visited Jones's car to install new batteries. J.A. 111.

The task force would not have been able to obtain this comprehensive real-time and historical record of the car's movements without the aid of GPS technology. The GPS device allowed the task force to collect far more information – and far more detailed information – than it would have been able to collect through physical surveillance, and to collect this information more covertly and at minimal expense.

This round-the-clock GPS surveillance was undertaken without a valid search warrant. A

warrant had been obtained on September 16, 2005, but its authorization expired before the GPS device was installed. J.A. 31-34. The government has not relied on that warrant to justify its actions in this case. Pet. App. 38a-39a n.*, 66a-74a, 83a. In any event, the September 16th order authorized installation of the GPS device only within the District of Columbia, but the GPS device was installed while the car was parked in Maryland. J.A. 98-100.

The government used the GPS data as a central part of its criminal case against Jones for his alleged involvement in a drug trafficking conspiracy. In October 2005, investigators arrested Jones and his fellow defendants and charged them under 21 U.S.C. § 846 with conspiracy to distribute cocaine, among other crimes. J.A. 35. The government used the GPS data to establish Jones's presence at the house alleged to have been the center of the drug activity. J.A. 112. Jones moved to suppress the GPS evidence prior to trial. J.A. 12. The district court denied the motion, allowing the government to use the GPS data except data recorded while the car was parked in Jones's private garage. J.A. 14-15.[2] A jury acquitted Jones of all charges except for a conspiracy charge, on which there was a hung jury. J.A. 16. Jones was then retried on the conspiracy charge and convicted. He was sentenced to life in prison. J.A. 66-69.

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[2] This was a meaningless exclusion. The GPS device did not transmit data when the vehicle was not moving, J.A. 84, and it told the police, within ten seconds, when the vehicle arrived at Jones's garage and when it departed.

The Court of Appeals reversed the conviction, concluding that the government's use of a GPS device to record the "totality and pattern of [Respondent's] movements from place to place," Pet.App. 22a, for nearly a month intruded upon his reasonable expectation of privacy. Pet.App. 16a. Having determined that the GPS tracking was a search under the Fourth Amendment, the Court of Appeals ruled that the GPS data should have been excluded because the government had not obtained a valid warrant or justified its failure to do so under the well-recognized and limited exceptions to the warrant requirement. Pet.App. 38a-39a.

This Court granted certiorari to decide whether warrantless GPS surveillance constitutes a "search" under the Fourth Amendment and whether the government violated the Fourth Amendment by installing a GPS tracking device without a valid warrant and without consent.

SUMMARY OF ARGUMENT

GPS technology provides law enforcement agents with a powerful and inexpensive method of tracking individuals over an extensive period of time and an unlimited expanse of space as they traverse public and private areas. Unless this Court concludes that GPS tracking is a Fourth Amendment search, any individual's movements could be subject to remote monitoring, and permanent recording, at the sole and unfettered discretion of any police officer. Without judicial oversight, the police could track unlimited numbers of people for days, weeks, or months at a time. Americans could never be confident that they were free from round-the-clock

surveillance of their activities. With a network of satellites constantly feeding data to a remote computer, police could, at any instant, determine an individual's current or past movements and the times and locations that he or she crossed paths with other GPS-tracked persons.

With technology that is already available, the police could monitor the movements of all members of disfavored political organizations, or all congregants at particular places of worship. Under the government's submission, the police could engage in this surveillance even if the targeted individuals were completely law abiding and presented no reasonable ground for any suspicion. Moreover, they could engage in this surveillance without judicial oversight of any kind.

This Court has never suggested that such surveillance is beyond the concern of the Fourth Amendment. *See United States v. Knotts*, 460 U.S. 276 (1983). Yet, the government candidly acknowledges that it wishes to use GPS technology "to gather information to *establish* probable cause," Pet.Br. at 50 (emphasis in original), rather than to deploy it after probable cause has been established and a warrant has issued.

The government seeks to justify its position by arguing that no reasonable expectation of privacy attaches to information that is capable of being ascertained by others, because such information has been "knowingly expose[d] to the public." Pet. Br. 18-19 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). But not all information that is capable of being ascertained by others has been knowingly exposed to the public. Indeed, if the Court had

accepted the government's equation in *Katz*, the Court would have been obligated to conclude that even the content of telephone calls warranted no Fourth Amendment protection, because a call made from a public phone booth may be monitored by an external wiretap or overheard by passersby. The Court did not endorse the government's reasoning in *Katz*, and it has not endorsed it since.

To hold that Americans lack a reasonable expectation of privacy in any information that is capable of being ascertained by others would have been problematic a century ago; today, such a holding would be devastating. Today's powerful technologies make it possible for government actors to ascertain many facts that individuals would prefer to keep private. GPS devices are only one of numerous new technologies capable of exposing private facts about individuals who have done nothing more than set foot outside of their homes. The cost of being out of doors should not include being targeted by a battery of technologies that possess surveillance capabilities far exceeding those of the unaided five senses.

Amici agree that the government's GPS tracking of Jones's movements was a Fourth Amendment search.[3] The information gathered was not knowingly exposed to the public. While Americans are obligated to take ordinary precautions to protect their privacy, they are surely not obligated

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[3] *Amici* also agree with Respondent that the installation of a GPS device on Respondent's car meaningfully interfered with his possessory interests and therefore constituted an unconstitutional seizure under the Fourth Amendment. This brief, however, does not address that issue.

to examine the undercarriages of their vehicles for covertly-installed GPS devices every time they go for a drive. The fact that discrete portions of one's life may be observed by friends, neighbors, and passers-by surely does not mean that Americans expect that the government will maintain a comprehensive, collated, and possibly permanent record of their movements each time they get into their cars. Pet.App. 29a ("[t]he difference is not one of degree but of kind"). Moreover, the type of information gathered by GPS devices exposes patterns of activity that are independently entitled to constitutional protection—every trip to a political meeting, medical appointment, or house of worship. This Court should hold that location data of the kind at issue here is properly considered private because it is not *knowingly* exposed to the public—just as the telephone call in *Katz* was not *knowingly* exposed to the public—and conclude that law enforcement agents may access it only by demonstrating probable cause and obtaining a warrant.

ARGUMENT

I. THE MERE FACT THAT INFORMATION IS CAPABLE OF BEING ASCERTAINED BY OTHERS DOES NOT DIVEST IT OF FOURTH AMENDMENT PROTECTION.

This Court has never held that all facts that are capable of being ascertained by others have been "knowingly expose[d] to the public," *Katz*, 389 U.S. at 351, and therefore devoid of constitutional protection. The government's proposal that, "when the police make observations of matters in public view, the assistance of technology does not transform

the surveillance into a search," Pet. Br. 22, does not fairly address the issue presented in this case. It wrongly assumes an expansive reading of what is "in public view"—one that is out of step with this Court's prior decisions, which have held that only facts *knowingly* exposed to others are divested of constitutional protection. Respondent did not knowingly expose a recorded collection of all his movements, for nearly a month, to the public. To accept the government's argument would dramatically shrink the scope of the Fourth Amendment because today's technologies make it easy to ascertain facts that individuals reasonably prefer and intend to keep private.

A. This Court Has Never Ruled That All Information Capable of Being Ascertained By Others Has Been Knowingly Exposed To The Public.

A person has not "knowingly exposed" a fact to the public simply because someone could gain access to it by some means. Indeed, if all information that could be ascertained by others lacked constitutional protection, then virtually nothing would be protected. The rule proposed by the government finds no support in this Court's prior decisions. Nor does it comport with the reality of modern life. In fact, had the Court accepted the government's construction of the "knowingly exposed" test in *Katz*, it would have been compelled to conclude that even telephone conversations are not protected.

In *Olmstead v. United States*, the Court considered whether the Fourth Amendment protects the content of telephone calls, and wrongly concluded that it did not. 277 U.S. 438 (1928). The majority

held that "[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment." *Id.* at 466.

In his dissent, Justice Brandeis recognized that the march of technological progress would not end with the telephone. This insight shaped his view of how to interpret the Fourth Amendment. He wrote, "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world." *Id.* at 472. The alternative, Justice Brandeis believed, was to allow the Fourth Amendment to weaken and become increasingly marginalized, a result that would "place the liberty of every man in the hands of every petty officer." *Id.* at 474 (internal quotation marks omitted). He wrote that "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." *Id.* (internal quotation marks omitted). More concretely, Justice Brandeis recognized that one of the core values protected by the Constitution is the right to exchange thoughts in private and that "[t]here is, in essence, no difference between the sealed letter and the private telephone message." Both, in his view, were entitled to constitutional protection. *Id.* at 475.

Thirty years later, the Court endorsed Justice Brandeis's reasoning and abandoned *Olmstead's* crabbed view of the Fourth Amendment. As Judge Posner has explained, "the Supreme Court has

insisted, ever since *Katz v. United States*, that the meaning of a Fourth Amendment search must change to keep pace with the march of science." *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (Posner, J.) (citation omitted).

In *Katz*, a majority of the Court, referencing the values protected by the Fourth Amendment, concluded that the government must obtain a warrant based on probable cause before eavesdropping on a telephone conversation. 389 U.S. at 351. In what has become a cornerstone of Fourth Amendment jurisprudence, the Court wrote:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. (citations omitted).

Katz "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property." *Kyllo v. United States*, 533 U.S. 27, 32 (2001).[4] Instead, the Court drew a dichotomy between "[w]hat a person knowingly exposes to the public," on the one hand, and "what he seeks to preserve as private," on the other. 389 U.S. at 351. Justice Harlan's concurrence posited that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that

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[4] This is not to say that property notions are irrelevant to the Fourth Amendment but, after *Katz*, they are no longer the sole determinant.

society recognizes as reasonable." *Kyllo*, 533 U.S. at 33 (citing *Katz*, 389 U.S. at 361).

Katz makes clear that otherwise-protected information does not lose its protected character merely because it can be ascertained by others without physical intrusion into a protected space. Specifically, *Katz* held that even though "the eavesdropping device picked up only sound waves that reached the exterior of the phone booth," *Kyllo*, 533 U.S. at 35, Charles Katz had a reasonable expectation of privacy in the content of his phone conversations, *Katz*, 533 U.S. at 351. A person who shuts the door of a public phone booth is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352.

In *Kyllo*, the Court again rejected the proposition that information that is ascertainable by others has by definition been knowingly exposed to the public. 533 U.S. at 35. The Court held that the use of a thermal imaging device to measure heat emanating from a home was a search, even though heat that has escaped from a building is ascertainable by others without invading or even touching the house. *Id.* at 40. Homeowners need not swaddle their interior rooms with insulation to manifest an expectation that the heat-generating activities in their homes will not be subject to warrantless searches. While the dissent in *Kyllo* argued that there had been no search because "the ordinary use of the senses" can in some circumstances allow a neighbor to gauge the heat radiating from a building, for example by observing snow melt patterns, *id.* at 43, the majority found this to be "quite irrelevant," *id.* at 35 n.2. "The fact that

equivalent information could sometimes be obtained by other means," the Court wrote, does not make lawful the use of means that violate the Fourth Amendment." *Id.* In short, the Court was not willing to approve the warrantless use of technology to obtain information about individuals simply because that information could in some circumstances be ascertained by others.

Between the bookends of *Katz* and *Kyllo* the Court repeatedly recognized reasonable expectations of privacy even where facts were ascertainable by others. In *Bond v. United States*, 529 U.S. 334, 338-39 (2000), the Court held that a police officer's manipulation of a soft-sided bag on a bus luggage rack was a search, even though travelers know that other travelers have access to bags on the rack and may handle them. Travelers are not obligated to purchase hard-sided luggage to protect their belongings from the poking and prodding fingers of law enforcement agents. In *Walter v. United States*, 447 U.S. 649, 657-59 (1980), the Court found that an individual had a reasonable expectation of privacy that required the government to demonstrate probable cause and obtain a warrant to view his motion pictures, even though the government had lawfully come into their possession and could readily view them using a projector. And in *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court held that a public employee can have a reasonable expectation of privacy in personal effects kept in his or her office desk and file cabinets, even though the employee knows that supervisors and colleagues have access to the employee's office.

The principle established by these cases is that the mere possibility that private information can be ascertained by others does not divest it of Fourth Amendment protection. The government's submission here is reminiscent of the majority's discredited reasoning in *Olmstead*. The government contends, in essence, that Jones's location information was unprotected by the Constitution because his travels did not take place entirely within his garage. But failure to guard against every possible means of access to one's life cannot fairly be equated with "knowing exposure."

B. In the Twenty-First Century, A Rule That All Information Capable of Being Ascertained By Others Has Been Knowingly Exposed to the Public Would Shrink The Fourth Amendment Into Irrelevance.

To hold that all facts capable of being ascertained by others are unprotected by the Fourth Amendment would radically constrict Americans' privacy rights. More and more facts about each of us are being collected and stored, "accessible at any time to reconstruct events or track behavior." Lawrence Lessig, *Code 2.0*, at 203 (2006). If the Court accepts the government's proposed rule, there will be little left of the privacy that Americans have long relied upon and that the Fourth Amendment was intended to guarantee.

GPS devices are among the most powerful of the currently available technologies that enable the government to ascertain what would otherwise be private facts. GPS devices allow lengthy and precise tracking of a vehicle's every movement, with minimal

effort and expense. Not even the most dedicated police squad could follow its target in such a manner. And while this case involves law enforcement agents attaching a GPS device to the undercarriage of a car, the increased prevalence of integrated car navigation systems may soon make even this minimal legwork unnecessary. *See, e.g., United States v. Coleman*, No. 07-20357, 2008 WL 495323, at * 1 (E.D. Mich. Feb. 20, 2008) (discussing issuance of court order requiring car navigation company to disclose location data to law enforcement).[5]

GPS technology may be used in even more intrusive ways. Tracking cars is an imperfect way of tracking people. Cellular telephones are a better proxy because many people carry their cell phones with them wherever they go, in private as well as public spaces. There are now more than 302 million active cell phone subscriber accounts in the United States.[6] The latest statistics indicate that 26.6% of households no longer even maintain a landline. *Id.* The government's proposed rule would effectively

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[5] Systems such as OnStar retain even more information: OnStar gleans information about "when your car's ignition is turned on or off and when your fuel is refilled," vehicle speed, safety belt usage, tire pressure, oil life remaining, and use of the car's features. OnStar Privacy Practices, Jan. 1, 2011, *available at* http://www.onstar.com/web/portal/privacy. Chrysler's new navigation system, Mopar EVTS, offers excessive speed notifications, arrival and departure notifications, historic maps of a vehicle's past location, and online tracking. Mopar EVTS, Chrysler, (2011), *available at* http://www.mopar.com/accessories/evts.html.

[6] CTIA, The Wireless Association, Wireless Quick Facts, *available at* http://www.ctia.org/advocacy/research/index.cfm/aid/10323.

turn each of these cell phones into an instrument of state surveillance to be activated at the unsupervised whim of any law enforcement officer.

With the assistance of cell phone companies, law enforcement agents already track cell phones in real time or check on their past locations by obtaining records cell phones companies keep. According to the Department of Justice, Verizon stores the past locations of its customers for one year while AT&T keeps records "from July 2008." Department of Justice, Retention Periods of Major U.S. Cellular Service Providers (Aug. 2010). In most circumstances, this surveillance is judicially approved, but under the government's proposed rule, it could take place without judicial oversight.[7]

Increasingly, law enforcement agents do not even need the cooperation of cell phone companies to track the location of cell phones. They can now do so on their own using devices variously known as triggerfish or stingrays. Department of Justice, Electronic Surveillance Manual 171 (2005), *available at* http://www.justice.gov/criminal/foia/docs/elec-sur-manual.pdf. These devices imitate cell phone towers, forcing cell phones to register their location so that they can be tracked. Jennifer Valentino-DeVries, *'Stingray' Phone Tracker Fuels Constitutional Clash*, Wall St. J., Sept. 22, 2011. They can also be used to identify all of the phones in a given location. Jennifer

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[7] Law enforcement agencies rely on the provisions of the stored communications acts to obtain historical cell phone location records. *See, e.g., In re The Application Of The United States For An Order Directing A Provider Of Elec. Comme'n Serv. To Disclose Records To The Gov't*, 620 F.3d 304, 307-08 (3d Cir. 2010).

Valentino-DeVries, *How 'Stingray' Devices Work*, Wall St. J. Digits Blog (Sept. 21, 2011), *available at* http://blogs.wsj.com/digits/2011/09/21/how-stingray-devices-work.

The hundreds of millions of Americans who choose to drive or use cell phones have not forfeited their privacy interest in their movements merely by availing themselves of technologies so commonplace that it would be difficult to live in society without them. Concluding that a person has no reasonable expectation of privacy in his movements because they are capable of being ascertained by others would divest Americans of privacy they have long enjoyed and continue to desire.

The government's proposed rule would have implications for other kinds of sensitive information as well. For example, facial recognition systems, too, enable the government to ascertain facts that individuals have not knowingly exposed to the public. A recent *Wall Street Journal* article described handheld facial recognition cameras that enable law enforcement agents to "snap a picture of a face from up to five feet away, or scan a person's irises from up to six inches away, and do an immediate search to see if there is a match with a database of people with criminal records." Emily Steel & Julia Angwin, *Device Raises Fear of Facial Profiling*, Wall St. J., July 13, 2011, at A1. Additional databases (*e.g.*, of people who have submitted insurance claims for drug treatment, or people who have defaulted on their mortgages) could obviously be added to the search. At $3,000 apiece, there is no meaningful financial barrier to the widespread use of these devices by law enforcement. *Id.* While walking around in public has

always brought with it the possibility of being recognized by an acquaintance, that is very different from having one's life history immediately available to every police officer with a fancy camera.

Americans who choose to step outside their homes have surely not thereby forfeited their privacy interest in their arrest records, medical histories and credit ratings. Concluding that a person has no privacy interest in his most personal information because some aspects of that information, frequently in fragmented form, are capable of being ascertained by others would deprive Americans of the privacy they have traditionally enjoyed even in public places. Pet.App. 26a ("the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all of those movements is not just remote, it is essentially nil").

This Court has been mindful that the rules it adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. Technologies that enable the monitoring and recording of a person's travels and identity are currently the most widely distributed and advanced tools that make it possible to ascertain traditionally private facts, but there are others on the horizon. For example, new "artificial nose" technology may allow government agents to detect odors from human perspiration that reveal details about the perspirer's health, history of drug or alcohol consumption, and emotional state. The Department of Homeland Security has funded studies to determine whether human body odor may indicate whether a person is telling the truth or

lying. Shaun Waterman, *Body Odor: New Proof of ID?*, United Press Int'l, Mar. 10, 2009; *see also* Thomas Frank, *Anxiety-Detecting Machines Could Spot Terrorists*, USA Today, Sept. 18, 2008, at 2A ("The futuristic machinery works on the same theory as a polygraph, looking for sharp swings in body temperature, pulse and breathing that signal the kind of anxiety exuded by a would-be terrorist or criminal. Unlike a lie-detector test that wires subjects to sensors as they answer questions, the 'Future Attribute Screening Technology' (FAST) scans people as they walk by a set of cameras.").[8]

Until now, courts have not had to grapple seriously with the distinction between facts that are "knowingly exposed" and facts that are ascertainable by others, because technology has been relatively modest in its power. The beeper at issue in *Knotts*, 460 U.S. at 277, was crude and limited, predating the availability of sophisticated surveillance technology. For most of our history, the Court has been able to rely on the natural limitations of human perception, perhaps assisted by magnifying glasses and flashlights, as a substantial if unacknowledged barrier on the ability of the state to monitor the people. That barrier is falling. Given that reality, the Court should not allow the Fourth Amendment to become a victim of technological obsolescence.

Allowing the Fourth Amendment status of a given fact to hinge on whether it is technically

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[8] Needless to say, the "terrorists" detected by such machines may be people who are anxious because they're about to give an important business presentation, or have just been told they have cancer, or are walking toward a job interview.

capable of being ascertained by others would unmoor the Fourth Amendment from any consistent meaning. The scope of the Fourth Amendment would continuously shrink as the technologies of surveillance evolve.

In sum, the Court should not accept the government's suggestion that, "when the police make observations of matters in public view, the assistance of technology does not transform the surveillance into a search." Pet. Br. 22. If "in public view" means ascertainable by members of the general public—however different those observations may be in quality and quantity from the surveillance that the government seeks to undertake—then the government's proposed rule is in conflict with this Court's decisions recognizing that people can have privacy expectations even in facts that others can technically ascertain; it would shrink the scope of the Fourth Amendment because today's powerful technologies allow so much information about all of us to be ascertained by others; and it would destabilize constitutional privacy protection because the constantly-evolving state of technological development would dictate an ever-shrinking Fourth Amendment.

II. THE GOVERNMENT'S GPS TRACKING OF JONES'S MOVEMENTS WAS A FOURTH AMENDMENT SEARCH.

Amici agree with the reasons stated in Respondent's brief that use of the GPS device constituted a Fourth Amendment search. As Respondent explains, there are three reasons why even short-term tracking via GPS constitutes a

search requiring a warrant and probable cause. Resp. Br. 16.

First, GPS devices must be installed by intruding onto private property, specifically an individual's car, in order to serve the government's purpose. *Id.* at 16-24. Just as the government's embedding of a spike mike in the wall of a house was found to violate the Fourth Amendment in *Silverman v. United States*, 365 U.S. 505, 512 (1961), so, too, attaching a GPS device to Jones's car renders the subsequent use of that device a search.

Second, GPS tracking is extremely invasive of personal privacy. *Id.* at 24-28. It enables law enforcement to capture the details of someone's movements for months on end unconstrained by the normal barriers of cost and officer resources. *See United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J, dissenting from denial of rehearing en banc) ("The modern devices used in Pineda-Moreno's case can record the car's movements without human intervention—quietly, invisibly, with uncanny precision. A small law enforcement team can deploy a dozen, a hundred, a thousand such devices and keep track of their various movements by computer, with far less effort than was previously needed to follow a single vehicle.").

Third, GPS devices generate data that could not be obtained through other means. Resp. Br. 28-29. No person could generate the constant and scientifically precise stream of data about another's whereabouts that is generated by a GPS device. *A fortiori*, as Respondent argues, the government's use

of GPS tracking for 24 hours a day for four weeks constitutes a search. *Id.* at 42-45.

But GPS surveillance of the sort the Government defends in this case violates the Fourth Amendment for still another reason: because it exposes patterns of activity, such as attendance at political meetings and visits to places of worship, that are independently entitled to constitutional protection.

As other courts have explained, GPS tracking—particularly over a prolonged period—can reveal a great deal about a person's values, associations, and beliefs. As the D.C. Circuit explained, "[a] person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts." Pet.App.30a. *See also People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009) ("Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."); *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003) (en banc) ("In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments,

associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life."); *United States v. Cuevas-Perez*, 640 F.3d 272, 286 (7th Cir. 2011) (Wood, J., dissenting) ("The technological devices available for [monitoring a person's movements] have rapidly attained a degree of accuracy that would have been unimaginable to an earlier generation. They make the system that George Orwell depicted in his famous novel, *1984*, seem clumsy and easily avoidable by comparison.").

To know where a person goes is to know who he is—how he spends his time and, by extension, what he values. Pet.App.30a. This Court has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and has also acknowledged that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460, 462 (1958). In *NAACP v. Alabama*, the Court held that Alabama could not compel the NAACP to divulge its membership list. That holding would have little force if Alabama could simply have attached GPS tracking devices to cars parked outside NAACP meetings and tracked those cars to their owners' homes, thereby ascertaining members' identities.[9]

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[9] Such information gathering might be subject to First Amendment challenge if it were known, but GPS surveillance is by its nature covert. This Court has recognized that Fourth Amendment safeguards are more important, not less, when

Beyond private associational activity, GPS tracking can also reveal a person's religious beliefs, or the existence of medical issues, each of which is also independently entitled to constitutional protection. The First Amendment protects one's "assembl[ance] with others for a worship service," *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990), but the exercise of this right would be seriously burdened by knowledge that the government is free to attach a GPS tracking device to every vehicle parked outside of a particular church, temple, or mosque. Similarly, an individual's right to make private medical decisions would suffer if her every doctor's visit could be monitored and recorded by a deputy sheriff or a District Attorney on a fishing expedition for evidence of painkiller abuse or late-term abortions. *See Whalen v. Roe*, 429 U.S. 589, 600 (1977) (discussing a patient's "interest in the nondisclosure of private information and also their interest in making important decisions independently").

As Respondent explains, the government's surreptitious GPS tracking of his movements violated his constitutional rights. Individuals reasonably expect that they will not be tracked in this manner even if they do not examine the undercarriages of their vehicles each and every time they drive. *Amici* agree with Respondent's demonstration of why this tracking violates the Fourth Amendment, and urge the Court to recognize that the power of GPS tracking to burden many other

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First Amendment rights are at stake. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978); *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

constitutionally protected activities is a strong additional reason to find that it should be carried out only with a judicially issued probable cause warrant.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
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UNITED STATES OF AMERICA,

Petitioner,

v.

ANTOINE JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the police violate the Fourth Amendment when they install a GPS device to track someone's movements for nearly a month.

2. Whether the police violate the Fourth Amendment when they attach a GPS device to someone's car without a warrant.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

SUMMARY OF ARGUMENT

Katz v. United States did not turn on a "reasonable expectations of privacy" but on the physical and legal methods that the appellant in that case had used to secure the privacy of his phone conversation. Reasoning backward from a "reasonable expectation of privacy" to constitutional protection has not been a successful approach to the Fourth Amendment's protections from the standpoint of judicial administration, guidance to law enforcement, or privacy.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief with the Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Here, data about respondent Jones's travels in his vehicle would never have come into existence were it not for the extraordinary use of a GPS device surreptitiously planted on his car. For purposes of constitutional analysis, therefore, the conversion of the vehicle to the government's purposes was a seizure and the data-gathering conducted with the surveillance-enabled car a search. Both were unreasonable in the absence of a valid warrant.

ARGUMENT

I. THIS COURT SHOULD UNITE THE MAJORITY'S DECISION IN *KATZ* WITH THE "REASONABLE EXPECTATIONS OF PRIVACY" LANGUAGE IN JUSTICE HARLAN'S CONCURRENCE TO DECIDE THIS CASE

Katz v. United States, 389 U.S. 347 (1967), is the lodestar of modern Fourth Amendment jurisprudence. Unfortunately, select phraseology has overtaken the rationale of that case, dominating the academic literature and Fourth Amendment case law. By joining the majority holding with the "reasonable expectation" language Justice Harlan used in his concurrence, this Court can clear up the doctrinal mess created by subsequent courts' use of the "reasonable expectation" test alone.

The *Katz* majority did not rely on Justice Harlan's "reasonable expectation of privacy" language. Rather, the Court rested its decision on the physical and legal protections Katz used to secure the privacy of his telephone conversation. It was unreasonable

for the government to overcome these protections in the absence of a valid warrant.

The "reasonable expectation" language in Justice Harlan's concurrence was an attractive addendum, but standing alone it is weak as a rule for deciding cases. As applied, the "reasonable expectation of privacy" test reverses the inquiry required by the Fourth Amendment and biases Fourth Amendment doctrine against privacy.

Having a "reasonable expectation of privacy" arises from giving physical and legal protection to information, but this Court should no longer reason backward from privacy "expectations" to Fourth Amendment protection. Applying *Katz*'s actual holding will do justice in this case and provide superior guidance to courts applying the Fourth Amendment in future cases.

A. *Katz* Rested on the Physical and Legal Protections Given to Information, Not on Justice Harlan's Concurrence or on "Reasonable Expectations"

Justice Stewart's majority opinion in *Katz* rested on the physical protection that the defendant had given to his oral communications—going into a phone booth—not on his expectations of privacy (let alone whether those expectations were reasonable). *Katz* thus held that Fourth Amendment protection turns on the physical and legal conditions governing access to information.

The striking lines Justice Stewart used to reverse *Olmstead v. United States*, 277 U.S. 438 (1928), are worth quoting as a reminder of the case's actual holding and rationale. Both parties to the case had

fixated on location, assuming based on precedent that being "in private" garnered constitutional protection, while being "in public" meant all bets were off. *Katz*, 389 U.S. at 351. But an increasingly mobile society and advancing communications technology had rendered physical location—*i.e.*, the home and curtilage—a weak proxy for having the interest in security against government intrusion that the Fourth Amendment protects. Justice Stewart wrote for the Court:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. (citations omitted).

This language is not a crystal clear rule for determining what is protected and what is not, but the better reading is that "may" in the third quoted sentence indicates possibility—constitutional protection of Katz's conversation turns on some contingency.[2] But what contingency? The most likely is right there in the sentence: whether something is "preserve[d] as private." *Id.*

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[2] The auxiliary verb "may" could indicate either permission or possibility. As permission (*i.e.*, Katz is allowed to protect this information), the sentence would be passive, unlike the preceding active sentence that it parallels. It would also beg the question that the Court purports to be answering. Given the parallel sentence structure and the forcefulness of the paragraph, the Court almost certainly intended to use "may" to indicate possibility rather than permission.

The same year that this Court decided *Katz*, scholar Alan Westin characterized privacy in his seminal book as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Alan Westin, *Privacy and Freedom* 7 (1967). This is the strongest sense of the word "privacy": the condition one enjoys when exercising control of personal information. *See* Jim Harper, *Understanding Privacy—and the Real Threats to It*, Cato Institute, Policy Analysis No. 520 (2004) ("Privacy is the subjective condition that people experience when they have power to control information about themselves and when they exercise that power consistent with their interests and values.")

In the paragraphs following the sentences block-quoted above, the Court discussed the fact establishing that Katz's phone conversations were indeed private: Katz was in a phone booth made of glass that concealed the sound of his voice. 389 U.S. at 352. Against the argument that Katz's body was in public for all to see, stripping any information he produced there of Fourth Amendment protection, the Court wrote: "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.*

Katz sought to preserve the privacy of his phone conversation, and he succeeded. With that condition cleared up, the final sentence in the block-quote above comes to mean, "What he *preserved* as private *is* constitutionally protected." Ordinary husbandry of information—the specific information at issue being the sound of his voice—gave Katz privacy and in

turn Fourth Amendment protection for that information.[3] It was unreasonable for government agents to use extraordinary technical means to overcome Katz's control of that information.

The majority decision did not raise or explore additional conditions controlling whether phone conversations occurring inside a telephone booth might be protected. Restating the rationale, unfortunately in reverse, the Court later noted that Katz "justifiably relied" on the privacy he enjoyed "while using the telephone booth." *Id.* at 353. This statement is simply an inference from the fact that it is unreasonable for government agents to invade privacy as they had done. Justice Harlan would expound on this inference in a way that further distracted future courts from *Katz*'s actual holding.

B. Taken Alone, Justice Harlan's *Katz* Concurrence Created a Confusing, Unworkable Test

The "reasonable expectation of privacy" formulation Justice Harlan used in his solo concurrence has certainly enjoyed repetition, but it was not the holding in the case. Only one justice dissented from the majority opinion, so *Katz* would have come out the same way regardless of how Justice Harlan voted or what he wrote; his concurrence does not supply the legal principle on which the *Katz* case turned.

The language he used, however, is important:

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[3] Had Katz objected to evidence of his presence in the phone booth—a photograph and testimony that he was seen there, for example—his objection would have failed because he had not taken control of the photons that revealed his presence the way he did the sound waves that reveal what he said.

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id. at 361.

Taken as the sole rationale of the *Katz* case, Harlan's dictum would change the factual question the majority opinion turned on—Was the information physically and legally available to others?—into a murky two-part analysis with a quasi-subjective part and a quasi-objective part. Judicial administration of the Fourth Amendment has suffered ever since, with courts mangling that analysis. And for good reason: It makes little sense as the sole rationale for deciding Fourth Amendment cases.

Take "exhibit[ing] an actual (subjective) expectation of privacy." People keep information about themselves private all the time without "exhibiting" that interest in any perceptible way—indeed, often without any subjective consideration at all. Families obscure their bathing behind the walls of their homes, for example, *see Kyllo v. United States*, 533 U.S. 27, 38 (2001), without contemplating that their walls provide them that privacy. One need not consider these things—much less "exhibit" anything other than routine behavior—to have a legitimate, actual interest in controlling information about oneself and one's life. Our world is built for ornate combinations of privacy and disclosure that are almost always customary, habitual, or subconscious. *See* Westin, at 8-22. They are rarely explicit, "exhibited,"

or a subject of a conscious "expectation." This does not diminish the importance of privacy or cut against enforcing the constitutional right that protects it.

Constitutional law does not require people to "exhibit" expectations about other constitutionally protected interests. Take life, for example. There is no argument that the defendant in a capital case should enjoy due process rights only if he eats well and exercises daily, "exhibiting" an interest in long life. An individual's Fourth-Amendment-backed interest in privacy is likewise real, whether or not it is exhibited, consciously considered, or expected.

Perhaps one "exhibits" an interest in the relevant dimension of privacy simply by entering a home or phone booth, or by whatever volition that conceals information from others. In its better reading, the first part of the inquiry Justice Harlan wrote about restates the majority's holding in *Katz*. If a person has privacy—if the information at issue was not generally available—he or she has "exhibited" an "actual (subjective) expectation of privacy."

The second part of Harlan's proposed inquiry is not as easily reconciled with the majority's holding. It seems to call on courts to speculate on what, in any given circumstance, society find reasonable to keep private. These are questions that philosophers would not be able to answer, nor sociologists to gauge—to say nothing of courts trying to administer constitutional rights.

What reconciles Justice Harlan's concurrence to the majority is treating his "reasonable expectation" language as a natural inference from the majority's holding. When one has arranged one's affairs using

physics and law to conceal information, it is unreasonable for government agents to defeat those arrangements using surreptitious means, outré technologies, and violations of law. Thus, as Justice Harlan suggested, it is reasonable to expect privacy in information so concealed.

Unfortunately, Harlan's concurrence suggested to later courts that the primary inquiry was to be into the reasonableness of privacy expectations. It is not. Reading his concurrence as a separate, unbounded inquiry into privacy expectations and their reasonableness puts it at odds with the *Katz* majority, which, again, premised constitutional protection on the physical and legal unavailability of the information the government gathered by going to lengths unreasonable without a warrant.

Unworkable as a true legal test, the second part of the "reasonable expectation" formulation has operated in subsequent cases as an open-ended grant of authority to constitutionalize judicial guesses about what society thinks.

C. This Court Has Not Successfully Applied the "Reasonable Expectation of Privacy" Test as the Sole Decision Rule in Subsequent Cases

Courts, including this Court, have been sorely challenged by attempts to apply the "reasonable expectation of privacy" language as a test divorced from the majority holding in *Katz*. They almost never apply it as Justice Harlan articulated it in his separate concurrence. Cases with some parallels to the instant case illustrate that well.

For example, purporting to address the defendant's subjective expectation of privacy in *United States v. Knotts*, 460 U.S. 276 (1983), the Court wrote, "Respondent Knotts . . . undoubtedly had the traditional expectation of privacy within a dwelling place." *Id.* at 282. This is objective treatment—what a normal person would expect—not what Knotts actually expected. Indeed, fealty to Justice Harlan's language would probably have required Knotts's subjective expectation to be a fact found at trial.

The *Knotts* Court continued: "But no such expectation of privacy extended to visual observation of [codefendant] Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.' *Hester v. United States*, 265 U.S. 57 (1924)." *Id.* The Court cites a 1920s case as though it establishes Knotts's state of mind with respect to the comings and goings of another to and from his property. This again is objective treatment—what he must have thought—not what he actually (subjectively) thought. The Court quickly collapses the first part of the "reasonable expectation of privacy" test into the second, analyzing only the reasonableness of Knotts's asserted constitutional interest.

The reasoning in *Knotts* relies heavily on *Smith v. Maryland*, 442 U.S. 735 (1979), which likewise punted on the subjective part of Justice Harlan's "reasonable expectation" approach. In that case, the Court argued at length, contra the petitioner's own argument, that he had a subjective expectation of privacy. The Court said it was "too much to believe" that a person dialing a phone could expect the num-

bers dialed to remain "secret." *Id.* at 743. Thus the Court found—apparently as a matter of law—what the petitioner held in his head at the time he dialed a phone. This is again, of course, objective treatment, based heavily in surmise, of what should have been a subjective, factual finding.

United States v. Karo, 468 U.S. 705 (1984), likewise illustrates the forbidding challenges in faithfully applying the "reasonable expectation of privacy" test as a stand-alone. As to the installation of a beeper in a can, the Court stated, "It is clear that the actual placement of the beeper into the can violated no one's Fourth Amendment rights." *Id.* at 711. The Court concluded either that Karo had no subjective expectation of privacy with regard to the placement of a beeper in a can or that the expectation was unreasonable—without saying which—or indeed both.

As to monitoring the beeper once it was in a private residence, *Karo* gave no indication that any court ever actually examined the subjective expectation of the defendant. "[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *Id.* at 714. The Court once again treated the subjective question as objective, and then objectively validated what the defendant presumably thought.

That inquiry is not what Justice Harlan's concurrence called for, much less the *Katz* majority. As a constitutional test, the "reasonable expectation of privacy" doctrine has been routinely and regularly misapplied.

D. Applied as the Sole Decision Rule, the "Reasonable Expectation of Privacy" Test Reverses the Inquiry Required by the Fourth Amendment and Imbalances Fourth Amendment Doctrine

With the subjective portion of the "reasonable expectation" test elided in most Fourth Amendment cases and the *Katz* majority's holding nowhere to be found, Justice Harlan's concurrence has been applied as a one-part test in which courts assess assumed "expectations of privacy" for reasonableness. This jurisprudential method is contrary to the Fourth Amendment's focus, which is on the reasonableness of government action, taking private ordering as a given: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated." (emphasis added). U.S. Const. amend. IV.

In *Karo*, however, the government arranged with an informant to surreptitiously install a beeper in a container, then used the beeper over a period of several days to locate the container at three different residences and the driveway of a fourth, to locate the container in a pair of self-service storage facilities, and also in transit—all the while unable to suffer the inconvenience of getting a warrant. 468 U.S. at 708-709. But it was the respondent that got the once-over to see if his (presumed) thinking was reasonable.

This Court does not apply further analysis like the "reasonable expectation" test when a party declines or fails to keep information private. The "plain view" doctrine is a constitutional test so simple that most people do not even realize it is a test. If a thing is visible (or otherwise perceivable) by authorities

acting within the law, a person cannot make a Fourth Amendment claim against them observing it and acting on the knowledge of it. See, *e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). If a person has not concealed something from others, he has not concealed it from the government.

The plain view doctrine was stated as common sense in *Katz*—"What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," 389 U.S. at 351—and it is the inverse of the holding, where concealment from others was concealment from the government.

Applying Justice Harlan's concurrence to concealment but not to exposure places a special impediment on the former. Somehow "plain view" is a simple factual question but "plain concealment" gets further consideration.

If courts were to apply a "Harlan concurrence" to the plain view doctrine, they might examine whether a person had "exhibited" the expectation that something would be visible and, if so, whether leaving such things visible was "reasonable." There might be instances where something plainly observable to all could not be noted or considered by law enforcement because of "reasonable expectations of privacy." Judges who thought society demanded greater privacy might reverse convictions when they found that defendants had left things visible that they would not have, in exercise of reasonableness, according to the judge's opinion of society's beliefs.

Such silliness is avoided in the area of plain view doctrine because there is no such gloss on that doctrine. The question whether something is in plain

view is a factual one. So should be the question whether something is concealed.

And this is what the *Katz* majority held. To restate again: In *Katz*, the defendant had obscured his voice from others as a matter of fact. The government's acquisition of his conversation by unusual means without a valid warrant was unreasonable and thus violated the Fourth Amendment.

Information that one plainly conceals from the general public, relying on the physics and law affecting the arrangement of objects in the world, is also concealed from the government. One has a "reasonable expectation of privacy" in things so hidden.

Nesting Justice Harlan's concurrence with the actual rule of *Katz*, as a straightforward inference from it, would restore symmetry to Fourth Amendment doctrine. In all but truly exceptional cases, using extraordinary means of accessing concealed information without a valid warrant is unreasonable and thus contrary to the Fourth Amendment.

II. IN APPLYING THE *KATZ* MAJORITY'S RATIONALE, THIS COURT SHOULD RECOGNIZE THAT FOURTH AMENDMENT PROTECTION STILL RELIES LARGELY ON PROPERTY ARRANGMENTS

Using the *Katz* majority's information-control rationale would vastly improve judicial administration of Fourth Amendment cases because that rationale turns on physical and legal access to information rather than anyone's feelings about privacy. The arrangements of people and things that affect access to

information are largely a question of property rights, another area in which subsequent courts have not fully apprehended the *Katz* majority decision.

Where *Katz* appeared to cut the Fourth Amendment loose from its foundation in property, reaffirming those timeless principles would make *Katz* a sound basis for securing Fourth Amendment interests. Property squares *Katz* with both Fourth Amendment history and the interpretation the amendment needs to serve its role in guiding law enforcement and protecting the privacy and liberty of future generations.

As noted above, Justice Stewart's majority opinion in *Katz* attacked the idea that location was a proxy for Fourth Amendment interests. Bluntly, he wrote, "The Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351.

That strong statement failed in some respects and worked too well in others. It failed because later courts did not break loose from the "home and curtilage" proxy for Fourth Amendment protection. In both *Knotts* and *Karo*, for example, this Court retreated to the home, so to speak, rather than fully adopting *Katz*'s information-control rationale. *Knotts*, 460 U.S. at 282; *Karo*, 468 U.S. at 714-15; *see also Kyllo*, 533 U.S. at 31. These minor misapplications of the Fourth Amendment and *Katz* did limited damage in these cases because homes are indeed places where physical and legal protections typically allow full maintenance of privacy. But these later Courts had not fully digest *Katz*'s rationale.

Where the "people, not places" idea worked too well was in cutting later courts loose from the prop-

erty principles that still undergird Fourth Amendment protection. The Court quoted a line from *Warden v. Hayden*, 387 U.S. 294 (1967), for the proposition that "property interests" were "discredited" in search and seizure law. 389 U.S. at 353. But *Hayden* validated a seizure of evidence over a criminal defendant's claim it was barred by a superior property right. This says nothing about the use individuals make of property to regulate others' access to their persons, houses, papers, and effects.

Indeed, property in the self and in the legal and physical arrangements of real and movable things—the right to property—is what secures the liberties the Fourth Amendment Framers sought to protect. Property was at the Founding, and still is, an essential component of ordered liberty, and a bulwark against government abuse. It is the individual's counterweight to the power of the state.

In one of his famous "Commentaries," Blackstone wrote: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries on the Laws of England *2.

In his essay on the same subject, James Madison called property "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." Among the items of property he extolled were "land, or merchandize, or money," and "opinions and the free communication of them." The individual has "a prop-

erty very dear to him in the safety and liberty of his person." James Madison, Property, in 14 The Papers of James Madison 266-268, March 29, 1792, available at http://presspubs.uchicago.edu/founders/documents/v1ch16s23.html. Property in the things that a person owns and controls—and in the self—creates a zone of liberty that the Fourth Amendment was intended to protect against arbitrary, "unreasonable" interference.

Property—the arrangement of the self and the things of the world around oneself—is a substantial guide for when Fourth Amendment protection applies. Courts can judge far better when a person has oriented himself, tangible things, and legal arrangements so that information is concealed than they can judge what expectations society would uphold as reasonable. Property is but one of the legal institutions individuals use to protect privacy. Tort law, contract, and government regulation also aid the individual in controlling others' access to personal information.

This common-law understanding was in no way reversed by *Katz*'s "people, not places" language. Using his self-possession, Katz oriented himself in a location where his voice was concealed. In doing so, he retained control of the sound of his voice. He did not abandon it to all in the vicinity, and he did not abandon it to the government.

Fourth Amendment doctrine was challenging enough before later judicial opinions and popular reinterpretations treated *Katz* as breaking the link between property and Fourth Amendments interests. Using home-and-curtilage as a proxy for constitutional protection is inapt to modern circumstances, but *Katz* did not reject the Fourth Amendment's

grounding in property law. Rather, it more subtly examined the physical and legal relationship between individuals and the things with which they interact to determine when the government invaded the privacy protected by the Fourth Amendment.

III. PLACING THE GPS DEVICE ON JONES'S VEHICLE WAS A FOURTH AMENDMENT SEIZURE AND ITS OPERATION A FOURTH AMENDMENT SEARCH

However it applies the rationale used by the *Katz* majority, this Court should find that the placement of a GPS device on respondent Jones's vehicle was a Fourth Amendment seizure of his property, and the operation of the device a Fourth Amendment search.

A. Converting Jones's Vehicle to a Surveillance Device Was a Constitutional Seizure

In the recent case of *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), this Court was urged to treat data bought and sold for marketing purposes as "a mere 'commodity' with no greater entitlement to First Amendment protection than 'beef jerky.'" *Id.* at 2666. Recognizing the relationship between information and protected speech, this Court preserved constitutional values in an Information Age context.

The instant case similarly calls on the Court to recognize core constitutional values and interests where new uses of information and technology may obscure them. Doing so does not require legal experimentation. Resorting to first principles, includ-

ing more careful examination of the characteristics of property, supplies the needed reasoning.

Before the information revolution, it may have been sound to treat deprivation of "possessory interests" and constitutional "seizures" as one and the same. Nearly always, possession was the aspect of ownership material to Fourth Amendment cases. Casual use of language in *Knotts*, *Karo*, and related cases thus seems to narrow the question of property seizure to only whether defendants lost "possessory" interest in articles they bought and transported. *Knotts*, 460 U.S. at 280-281; *Karo*, 486 U.S at 712. This approach does not translate to the information technology context if the interests secured by the Fourth Amendment are to survive.

Treating "seizure" and deprivation of "possessory interests" as interchangeable can barely withstand scrutiny even before considering the effects of information technology. Assume an individual who parks his car in an office parking lot, for example. Government agents hotwire the car, drive it 16 miles, and return it to the same location topped up with gas before the owner returns. This would not deprive the owner of a "possessory interest," but it would most certainly be a seizure of his property.

And if a government agent accessed the bank account of an individual and withdrew $800, spent the money, then replaced the funds before the individual sought to access it, this, too, would be a seizure of property that does not affect a "possessory" interest. Possession is not all there is to property. Nor is deprivation of possession the only form of seizure.

A third example illustrates in an information context how restricting property seizure to only the "possessory" interest is an error. Posit a government agent who picks up a smart phone left on a cocktail table while its owner is in the restroom. In a few brief moments she downloads a "parental control" application that sends a copy of each text message sent and received, each website visited, and each posting on social networks, to an address she designates. Restoring the imperceptibly different phone to its original place before the owner returns, the government agent has denied the owner no "possessory" interest. But that phone now reveals comprehensive information to a stranger about the owner's workaday and intimate communications, business interactions, and much more. These digital effects are within the ambit of what the Fourth Amendment is meant to secure.

Possession is but one of the rights in the "bundle of sticks" that constitute property. That conception of property as a bundle of sticks, *see Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), is due in large part to the work of legal philosopher Tony Honoré. In his essay, "Ownership," he articulated the incidents of ownership common to "mature legal systems." Tony Honoré, *Ownership*, in *Making Law Bind: Essays Legal and Philosophical* 161, 162 (1987). That is:

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuarity.

Honoré at 165.

Several of these property rights are invaded by the installation of a GPS device on a vehicle. If the government did not invade Jones's right to possess his vehicle significantly enough during its exercise of dominion to install the device, the government did invade the trio of rights to use, manage, and enjoy income. Government agents used the car during the entire period of the device's installation to transport their monitoring tool. Indeed, they made the same use of the vehicle for transporting their device that Jones made of it for transporting himself, his things, and his guests. Then there is the right to manage, "the right to decide how and by whom the thing owned shall be used." Honoré at 168. This right the government invaded by making the car an auxiliary of its surveillance project. Government agents also invaded the right to the income, using the car to produce digital records for their use. Income need not be pecuniary, as Honoré wrote, "[R]ent-free use or occupation of a home is a form of income." Honoré at 169. So is using another's property for the production of data. Income is the enjoyment of emoluments that an item produces, whatever their nature.

Treating the issue slightly differently, this Court has emphasized the "right to exclude others" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). One is not "excluded" from the property of another when attaching

items to it and enjoying the benefits of that attachment. A constitutional seizure can occur when the government invades a property right other than possession.

When determining whether a search or seizure implicating the Fourth Amendment has occurred, there is no need to weigh or balance such things as the amount of data a device produces, the quality or intimacy of the data, or the "power" of a device to reveal sensitive information—though GPS is indeed powerful. These are relevant when considering whether a seizure (or search facilitated by seizure) is reasonable. The invasion of a property right that converts one's property to the government's surveillance purposes is a constitutional seizure that merits that examination for reasonableness.

This Court's cases have rarely defined "seizure" distinct from "search," *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) ("the concept of a 'seizure' of property is not much discussed in our cases"); *but see Soldal v. Cook County*, 506 U.S. 56 (1992) (holding that seizure of mobile home violates Fourth Amendment). In *Arizona v. Hicks*, 480 U.S. 321 (1987), this Court characterized the movement of stereo equipment to gather a serial number as a "search," though it might more precisely have characterized it as a seizure incident to a search. Whatever the case, the stereo equipment was not law enforcement's to move. "The distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment." *Id.* at 325. Turgid reasoning and makeweight argument (calling Vehicle Identification Numbers "a significant thread in the web of regula-

tion of the automobile") confess the weakness of contrary cases such as *New York v. Class*, 475 U.S. 106, 111-12 (1986), which approved a police officer's "unintrusive" reaching into a vehicle to move papers so he could see a VIN, though he had no suspicion that the car was stolen. *Id.* at 108, 119.

Jones's vehicle was not the government's to commandeer and convert to their surveillance purposes. Doing so was a constitutional seizure.

B. Using Jones's Vehicle to Track Him Was a Constitutional Search

Whether or not the application of a GPS monitoring device to Jones' vehicle was a Fourth Amendment seizure, the use of that device to study his movements over four weeks was a search that implicates the Fourth Amendment.

As a preliminary matter, this Court should recognize and clearly affirm here that digital materials have the same constitutional status as those that are recorded on other media (such as paper). The federal trial court system has recognized, as it must, that digital representations of information are equivalent to paper documents for purposes of both filing and discovery. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report of the Civil Rules Advisory Committee 2, 18-22, May 27, 2005. The subject matter held in digital documents and communications is at least as extensive and intimate as what is held on paper records, and probably much more so. *See* Mary Czerwinski et al., *Digital Memories in an Era of Ubiquitous Computing and Abundant Storage*, Communications of the ACM 45, Jan. 2006, available at

http://research.microsoft.com/pubs/79673/CACMJan2006DigitalMemories.pdf. The representation of personal information on media other than paper changes nothing about its Fourth Amendment significance. The same information about each American's life that once resided in a desk drawer, or simply in one's memory—if remembered at all—is now recorded on digital media.

Digital representations of information are constitutional "papers," or at least digital "effects," secured by the Fourth Amendment. It is essential to make clear that the coverage of the Fourth Amendment extends to these other media.

On the question of when such papers and effects have been searched, once again the "reasonable expectation of privacy" doctrine has confused matters. This Court should still find, however, consistent with the outcomes of past cases, that a "search" has occurred when technological enhancement takes what the government observes far beyond what is ordinarily accessible.

This Court has episodically grappled with the question whether "technological enhancement of ordinary perception . . . is too much." *Kyllo*, 533 U.S. at 33. Such enhancement this Court should recognize as a "search."

"When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as to search the house for a book; to search the wood for a thief." *Id.* at 33 n.1 (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)).

As the Court noted in *Kyllo*, "visual observation is no 'search,'" 533 U.S. at 32. The Court's long-held and pragmatic position is that what is plainly observable by government agents from a position they are legally entitled to occupy is not a constitutional search requiring reasonableness or a warrant. They are "just looking."

Indeed, the universe of things observable can be divided into two parts: those things that are in plain view (or otherwise plainly observable) and those that are observable based on a Fourth Amendment search. This Court's cases show that observation or "looking" has taken a sharp enough focus and risen to the level of "search" in two circumstances. One is when observation is accompanied by a seizure, such as of people, see, *e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968), or of things, see, *e.g.*, *Arizona v. Hicks*, 480 U.S. 321. The second is when observation is technologically enhanced, such as by wiretap, beeper, or thermal imager. In these latter cases, this Court has struggled, both with recognizing the existence of a search, *Olmstead*, 277 U.S. at 466, *rev'd* by *Katz*, 389 U.S. at 353, and sometimes the existence of a security interest that the Fourth Amendment was meant to protect. *Knotts*, 460 U.S. at 282; *Karo*, 468 U.S. at 714-715; but see *Katz*, 389 U.S. at 353. The Court should evaluate these considerations with great care in this case.

Capturing Jones's movements was "technologically enhanced" observation that rises well beyond "looking" at items and events in plain view. Such observation rises to the level of a Fourth Amendment search no less than the technologically enhanced search in *Kyllo*.

GPS technology uses satellite signals to triangulate fairly precise location observations, and—just as importantly—captures this data in highly useful digital form at regular intervals for any period that the operator chooses. It is not "just looking" when an electronic device triangulates its location using signals beamed from space and records them every 10 seconds for several weeks.

Of course, not all technological enhancement converts looking to constitutional searching. Wearing corrective glasses while examining something in plain view does not convert ordinary "looking" into constitutional "searching." Using high-powered binoculars to observe something at a long distance may or may not be a constitutional search, depending on the factual circumstances. But using GPS-tracking devices is an exotic technical enhancement of observation, use of which this Court should find—at this stage of technological development—to constitute a search for Fourth Amendment purposes.[4]

Government agents' use of an uncommon technological enhancement thus raises the question of whether that resulting search was reasonable in the absence of a valid warrant.

---

[4] The "stage of technological development" is an important factor because the dividing line between plain-view "looking" and constitutional "searching" will always be technologically contingent. Future courts in harder cases can make judgments about whether a technology has become common enough to be thought of as an "ordinary" way of perceiving the world. In any event, surreptitious GPS tracking is not today an ordinary way that anyone in the general public uses to learn the whereabouts of anyone else in minute detail over extended periods.

IV. MONITORING THE MOVEMENTS OF A CAR FULL-TIME FOR FOUR WEEKS VIA GPS DEVICE WITHOUT A VALID WARRANT IS UNREASONABLE

In the ordinary course of events, information cataloguing the movements of respondent Jones's vehicle over four weeks, and even far shorter periods, was available to *nobody*. The government's use of very powerful technology was inconsistent with emerging norms that limit information collection of this type and restrict access to it when it is created. The creation and collection of that data without a warrant was thus an unreasonable search, product of an unreasonable seizure, and a violation of Jones's Fourth Amendment rights.

A. The Government Used Very Powerful Information Technology

Like Katz walking into a telephone booth, Jones used ordinary husbandry of information to maintain his movements as private. Government agents unreasonably defeated his privacy by maintaining a GPS device on his car during a four-week period without a valid warrant.

If it seems strange that doing nothing in particular to prevent others accessing data is "ordinary husbandry," that reflects the extraordinary nature of the measure government agents took to create and collect this data. Because nobody ever follows anybody that long, preserving privacy in the information reflecting all of one's movements for four weeks can be achieved simply by relying on the physical difficulty and costs of such surveillance. The distances Jones traveled over elapsing time served the same informa-

tion-control purposes the glass walls of the phone booth did in *Katz*. As the lower court found, "the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010). The record of Jones's movements was available to nobody, so, taking private ordering as a given, it was not available to the government. Producing and accessing that information using extraordinary technical means without a valid warrant was unreasonable.

In *Kyllo*, this Court grappled similarly with the shifting interplay of privacy and technology. In that case, government agents had used a thermal imager to note unusual heat patterns emanating from the wall of a home. The imager augmented what was visible to law enforcement by bringing otherwise invisible heat patterns within the visual spectrum for them to observe and record on tape. 533 U.S. at 34. Doing so violated Kyllo's Fourth Amendment rights.

The GPS device here augmented human perception in not just one, but at least three ways. First, it produced location data that was far more accurate than anything a human might have recorded. The device recorded location to latitudinal and longitudinal measurements at 10-second intervals while the car was in motion. JA 81-82, 85. This is a level of precision and productivity no human observer could have matched.

More importantly, this data was recorded digitally and in a highly interoperable, structured format, something ordinary human observation and commonly used cameras and voice recorders do not

do. Digital information can be stored, transmitted, copied, and processed far more quickly and cheaply than analog information. That means that records can last forever, they can be shared widely over their indefinite lifetimes, and as many copies can be made as their controllers please.

Processing is where the power of digital data really lies, though. Nearly instant scans of the data can turn up otherwise unknown (and thus private) patterns of behavior. Because of the data's structure, combinations of GPS data, or mash-ups of GPS data with maps, directories, and other data can reveal many of the relationships and behaviors that the person being tracked keeps obscure to all others. *See* Jeff Jonas, *Your Movements Speak for Themselves: Space-Time Travel Data is Analytic Super-Food!*, Aug. 16, 2009, http://jeffjonas.typepad.com/jeff_jonas/2009/08/your-movements-speak-for-themselves-spacetime-travel-data-is-analytic-superfood.html. In quantity, digital data has vastly more insightful uses—for good and bad—than a logbook of a suspect's movements taken down via visual (or any other analog) surveillance. "[L]arge amounts of data yield discoveries and intuitions that surprise even experts." Jiawei Han *et al.*, *Data Mining: Concepts and Techniques* xix (2012).

The final way that GPS augments human observation is by vastly expanding observation along the time dimension. A team of human observers could not produce the location data that a GPS device can for the period of time, day and night, that a GPS device does. If the problem is learning where a suspect goes, using a GPS device is like bringing a bazooka to a knife-fight. Given the consequences for

privacy of the innocent, that kind of power should be used subject to the grant of permission by a court.

The power of GPS data-recording also distinguishes this case from *Karo* and *Knotts*, in which government agents used comparatively impotent "beeper" technology to locate and track objects that were allegedly in criminal use. The beepers at issue in these cases were equivalent to directionless, analog radio "hollers," indicating their presence over limited distances and making themselves and the canisters that contained them easier to find. The beepers recorded nothing at all, much less did they make detailed digital records of location data. Beepers have trivial power compared to GPS technology.

The government's employment of a device such as GPS to explore the details of people's lives that would otherwise not have been knowable is unreasonable without a valid warrant.

B. Emerging Norms Limit Collection and Use of Location Data

Emerging norms support a finding specifically that collection of GPS data correlating to an individual's movements is unconstitutional without a valid warrant. Society continues to grapple with GPS data and location tracking, of course. While there are many beneficial uses of location data, few of them amount to publishing one's location around the clock for weeks. And no location-based service collects and publishes location information surreptitiously. Even as location information sees more uses in society, the warrant requirement will help to ensure that law enforcement does not use changing technology to violate individual rights.

As to collection norms, recent events illustrate the sensitivity of consumers to GPS data. The "OnStar" telematics (integrated telecommunications and informatics) service recently suffered public wrath when it changed its Terms of Service to allow it to collect GPS data from the cars of people who no longer use the service. After a short time, OnStar reversed course and now will not collect GPS data unless former customers consent to its collection. David Kelly, *GM's OnStar Reverses After Complaints Over Privacy*, AOL Autos, Sept. 28, 2011, http://autos.aol.com/article/gms-onstar-reverses-after-complaints-over-privacy/.

The fact that location information is part of the Terms of Service in telematics services is worth noting. The OnStar privacy policy specifically indicates that collection of GPS data is limited to specific, relatively rare, circumstances, and that location information is not shared. OnStar Corporation, Privacy Policy, *available at*: http://www.onstar.com/web/portal/privacy (last visited Sept. 29, 2011).

Similarly, our society is converging on restrictive treatment of data automobiles generally create and collect. The California legislature, for example, passed a law in 2003 that tightly restricts retrieval of data from automobile "event data recorders" (black boxes) by anyone other than vehicles' registered owners. Cal. Veh. Code § 9950-9953. Twelve other states have enacted similar laws. Ark. Code Ann. § 27-37-103; Colo. Rev. Stat. § 12-6-4; Conn. Gen. Stat. § 14-164aa; Me. Rev. Stat. § 29A-1-17-3; N.H. Rev. Stat. Ann. § 357-G:1; NY CLS Veh. & Tr. § 4A16 416-B; Nev. Rev. Stat. Ann. § 484.638; N.D. Cent. Code, § 51-07-28; Or. Rev. Stat. §§ 105.925-45; Tex.

Transp. Code § 547.615; Va. Code Ann. § 46.2-1088.6; Rev. Code Wash. § 46.35.010-50.

Surreptitious collection of location information on a continuous basis is contrary to societal norms. Use of GPS by a private party to monitor the movements of another without consent would probably result in liability under stalking laws, and perhaps other criminal statutes. District of Columbia anti-stalking legislation provides for imprisonment and fines of those who violate its terms, including through the use of GPS. D.C. Code § 22-3133. "Where a single act is of a continuing nature," the law says, "each 24-hour period constitutes a separate occasion." D.C. Code § 22-3133(c).

Police investigatory work is not stalking, of course. It neither fits the legal definition, nor has it any of the same moral content. But persistent and intensive observation of others is behavior that society regards as abnormal. It is out of the ordinary, contrary to common values, and—unlike ordinary observation—a behavior that should be conducted with restraint, subject to judicial oversight.

CONCLUSION

The information-control rationale of *Katz v. United States* turns on physical and legal protections for information that, when in place, create a "reasonable expectation of privacy." Reasoning backward from "reasonable expectations of privacy" to constitutional protection has not been a successful approach to the Fourth Amendment from the standpoint of judicial administration, guidance to law enforcement, or privacy.

Data about respondent Jones's travels would never have come in to existence without the extraordinary use of a GPS device surreptitiously planted on his car. The conversion of the car to the government's purposes, and the surveillance conducted with that converted car, constitute an unreasonable search and seizure in the absence of a valid warrant.

For the foregoing reasons, this Court should affirm the D.C. Circuit's judgment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA,

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v.

ANTOINE JONES,

Respondent.

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BRIEF OF CENTER FOR DEMOCRACY & TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, MATT BLAZE, ANDREW J. BLUMBERG, ROGER L. EASTON, AND NORMAN M. SADEH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether the warrantless use of a GPS tracking device on a vehicle to monitor its movements on public streets violates the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

This case brings before the Court important issues regarding the application of the Fourth Amendment's protection against unreasonable searches in the context of Global Positioning System (GPS) tracking technology. *Amici* consist of nationwide organizations and individuals with expertise regarding the technical operation of GPS and other technologies and the application of the Fourth Amendment to new and emerging technologies:

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases addressing civil liberties issues raised by emerging technologies, including location-based tracking techniques such as GPS.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Matt Blaze is associate professor of computer and information science at the University of Pennsylvania and director of the Distributed Computing Laboratory. He conducts research on security, networks, and surveillance technology.

Andrew J. Blumberg is an assistant professor of mathematics at the University of Texas at Austin. He has worked on the design and implementation of systems that use modern cryptography to provide location-based services while preserving user anonymity and privacy.

Roger L. Easton is the father of the GPS. He was the principal inventor and developer of the Timation Satellite Navigation System at the Naval Research Laboratory, where he worked from 1943 until his retirement in 1980. Today's GPS is based on Timation, and its principles of operation are fundamentally identical. Mr. Easton was inducted into the GPS Hall of Fame in 2006 and the National Inventors Hall of Fame in 2010. His awards include the National Medal of Technology, Navy Distinguished Civilian Service Award, Institute of Navigation Thurlow Award, and Sigma Xi Applied Science Award.

Norman M. Sadeh is a professor in the School of Computer Science at Carnegie Mellon University, where he directs the Mobile Commerce Laboratory. Dr. Sadeh's research focus has been in the area of mobile and pervasive computing, web privacy, and security. Products based on his research have been deployed and commercialized by IBM, Raytheon, Mitsubishi, and Boeing. Dr. Sadeh has authored over 150 scientific publications, including "m-Commerce: Technologies, Services and Business Models" (2002).

SUMMARY OF ARGUMENT

The threshold question in this case is whether the government's use of GPS technology to track respondent's vehicle infringed a reasonable expectation of privacy and therefore constituted a search within the meaning of the Fourth Amendment.

Just recently, the Court recognized the need to consider the nature of new technologies when defining "the existence, and extent, of privacy expectations" under the Fourth Amendment. *City of Ontario* v. *Quon*, 130 S.Ct. 2619, 2629 (2010). See also *Katz* v. *United States*, 389 U.S. 347 (1967) (overturning ruling in *Olmstead* v. *United States*, 277 U.S. 438 (1928), regarding application of Fourth Amendment to telephone conversations).

The same attention to the impact of new technology is warranted with respect to the government's contentions here, which—in minimizing the fundamental change in information collection that results from the revolutionary nature of GPS—would have the effect of substantially limiting the application of the Fourth Amendment.

The government's argument rests on two propositions. First, that GPS tracking is the technological and practical equivalent of the beeper-assisted surveillance held not to constitute a search in *United States* v. *Knotts*, 460 U.S. 276 (1983). Second, that the constitutional analysis in *Knotts* is controlling here. The government is wrong on both counts.

GPS tracking is fundamentally different from beeper-assisted surveillance:

- GPS tracking is an automated process wholly divorced from human observation that employs

technology unrelated to visual surveillance. Beeper-assisted surveillance requires a police officer to follow the targeted vehicle for the duration of the surveillance in order to ascertain where the vehicle travels during that period.

- The evidence produced by GPS tracking consists of longitude, latitude, and altitude coordinates showing the vehicle's locations. A beeper and its receiver do not produce data that can be presented in court. The beeper's audio signals are relayed in real-time, and communicate only the vehicle's direction and distance at any given moment relative to the receiver being monitored by the police officer. The police officer's testimony regarding what he saw and heard are the only evidence of the vehicle's location.

- GPS tracking compiles a precise—and highly detailed—record of the vehicle's location at ten-second intervals for the entire period that the tracking function is activated. Because a beeper indicates only the tracked vehicle's approximate direction and distance relative to the receiver, an officer's ability to record a comprehensive list of the vehicle's locations using beeper-assisted surveillance depends entirely on the officer's ability to maintain visual surveillance of the vehicle.

- GPS tracking can be conducted around-the-clock for extensive periods of time, because, once the receiver is installed, the data collection is automatic and requires no real-time human monitoring. Beeper-assisted surveillance for anything other than a short period of time requires significant personnel and other resources: a police car, receiver, and other necessary equipment must be

assigned to each beeper twenty-four hours a day, seven days a week.

- GPS tracking can be used simultaneously on very large numbers of vehicles and individuals. Large-scale monitoring using beeper-assisted surveillance is a practical impossibility.

These differences between the two technologies lead to different outcomes under the reasonable expectation of privacy standard.

The government contends that as long as one individual fact is susceptible to human observation in a public place—such as a person's location at a particular moment in time—the government may use any means to monitor and record the person's location on a continuous basis. But this Court in *Katz* rejected the argument that an individual loses all privacy protection simply by appearing in public. Especially in this era of rapid advances in technology, the Court should refuse to grant what would amount to a blanket exclusion from Fourth Amendment review of the government's use of large categories of new technologies.

This Court's precedents make clear that GPS tracking triggers application of the Fourth Amendment for two reasons. First, it is a wholly automated process unrelated to human observation that generates information fundamentally different from—and far more precise and extensive than—human surveillance of the type that a person would reasonably expect. For these reasons alone, it intrudes upon reasonable expectations of privacy.

Second, even if GPS tracking were deemed merely to augment human surveillance, its precision and persistence is such that, based on the standards for

technological enhancement applied in this Court's cases, its use intrudes on citizens' reasonable privacy expectations. GPS tracking cannot be "readily duplicate[d]" by the public (*Dow Chemical Co.* v. *United States*, 476 U.S. 227, 231 (1986)): members of the public would be subject to civil and perhaps criminal liability if they employed GPS technology to track a vehicle without the owner's consent. And the information obtained from GPS tracking reveals intimate details not detectable through human observation.

New technologies provide great benefits, but they also carry the potential to "shrink the realm of guaranteed privacy." *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001). To avoid that result, this Court should carefully analyze the real-world effects of these technologies—carefully scrutinizing arguments resting on claimed equivalence of very different methods of gathering information—as well as citizens' reasonable privacy expectations, and apply its Fourth Amendment precedents based on those realities.

ARGUMENT

I. GPS TRACKING IS FUNDAMENTALLY DIFFERENT FROM THE BEEPER-ASSISTED SURVEILLANCE CONSIDERED BY THE COURT IN KNOTTS.

The government's argument that GPS tracking is legally indistinguishable from the use of the beeper in *United States* v. *Knotts*, *supra*, rests principally on its depiction of the two technologies as essentially equivalent: "*Knotts*, like this case, involved the use of a tracking device to monitor the movements of a vehicle on public roads. The tracking device in that case—a beeper—enabled officers to maintain surveil-

lance of the vehicle's movements when visual observations failed." U.S. Br. 12.

In fact, GPS tracking differs fundamentally from the beeper-assisted surveillance that this Court considered in *Knotts*.

A. GPS Tracking

The Global Positioning System consists of a set of government-owned satellites that continuously transmit navigation data to Earth. Any person can access this data with a simple device called a GPS receiver, which reads the transmissions sent from the satellites. The receiver uses this data to calculate the receiver's latitude, longitude, and altitude—and thereby pinpoints its location. That location information may be stored in the device itself or sent on a continuous basis—using mobile phone technology—to another device, such as a computer, designated by the party who controls the receiver.

Initially, GPS was developed by the Department of Defense for military use. *See* Scott Pace et al., RAND Corp., *The Global Positioning System: Assessing National Policies*, app. B at 237-247, *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR614.pdf. Today, it is a dual-use system, providing separate services for the military and civilian communities. The Precise Positioning Service (PPS) is designed for military use, with the navigation data encrypted to control access. *Understanding GPS: Principles and Applications* 3-4 (Elliot D. Kaplan & Christopher J. Hegarty eds., 2d ed. 2006) (*Understanding GPS*). The Standard Positioning Service (SPS) transmits non-encrypted data,

which anyone can use. *Id.* at 4.[2] GPS receivers employed by law enforcement officers utilize SPS.

The core of the system is a constellation of 27 government-owned satellites in fixed orbits approximately 20,200 km, or 12,552 miles, above the Earth.[3] These satellites are maintained by the United States Air Force.[4] For FY 2012 alone, the Administration requested $1.2 billion for maintaining and improving GPS.[5]

GPS operates using a concept called "time of arrival ranging." *Understanding GPS*, *supra*, at 3. Each satellite continuously transmits a ranging signal. *Id.* at 24. An atomic clock onboard the satellite controls the timing of the ranging signal broadcast, and every transmission from a satellite is embedded with information indicating the time the signal left the satellite. *Id.* at 25. The satellite transmissions do not target specific receivers on the ground, but rather can be used by any receiver—and an unlimited number of receivers—that are in a position to receive the satellite's transmissions.

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[2] Prior to May 1, 2000, the government introduced random errors into the SPS to reduce the accuracy of the information provided to civilians, but it has discontinued this practice. See *Understanding GPS*, *supra*, at 4.

[3] Global Positioning System, *Space Segment*, GPS.gov, http://www.gps.gov/systems/gps/space/ (last visited Oct. 2, 2011).

[4] *Global Positioning System Standard Positioning Service Performance Standard* 5-6 (4th ed. 2008), *available at* http://www.pnt.gov/public/docs/2008/spsps2008.pdf

[5] *President's Budget Request for FY 2012*, http://www.gps.gov/policy/funding/2012/ (last visited on Oct.2, 2011).

A GPS receiver on the ground contains an antenna tuned to the frequencies transmitted by the satellites, and a clock synchronized to the clock onboard the satellites. *Id.* at 21; Zafar Ullah & Floyd Goodrich, *GPS Technology: Know Where You Are, Know How It Works* (2009), *available at* http://www.arrownac.com/services-tools/design/whitepapers/resource_aug09_gps.pdf. When the receiver receives a ranging signal from a satellite, it uses the difference between the time when the ranging signal was sent and the time when the ranging signal was received in order to calculate the distance between the receiver and the satellite. Scott Pace, *The Global Positioning System*, *supra*, app. A at 220 ("GPS works by timing how long it takes coded radio signals to reach the earth from its satellites.").[6]

The receiver calculates its latitude, longitude, and altitude based on transmissions from the four nearest satellites using a process called trilateration. This process is best illustrated by imagining a GPS receiver located on the ground and four satellites (Satellites A, B, C, and D) located in the sky. The GPS receiver calculates that it is 10 miles away from Satellite A. Therefore, the receiver knows it is located somewhere on the surface of a sphere with a 10-mile radius, with the center of the sphere being Satellite A. Next, the receiver calculates it is located 15 miles away from Satellite B, which again means that it is located somewhere on the surface of a sphere with a 15-mile radius, centered on Satellite B.

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[6] More detailed information about the mathematical process by which a GPS receiver calculates this difference and subsequently determines its precise location can be found at *Understanding GPS*, *supra*, at 21-65.

By repeating these calculations with Satellites C and D, the receiver can calculate where all four spheres intersect with each other, which will be one discrete point on the Earth's surface.[7]

A GPS receiver also can compute its speed and the direction it is traveling with the data it receives from the satellites. Scott Pace et al., RAND Corp., *supra*, app. A at 225.

The accuracy of the receiver's calculation of location information depends in part on atmospheric effects and the quality of the receiver, but the Federal Aviation Administration has determined that high-quality non-military receivers "currently provide better than 3 meter horizontal accuracy." Global Positioning System, GPS.gov, *GPS Accuracy*, http://www.gps.gov/systems/gps/performance/accuracy/ (last visited Oct. 2, 2011). With the use of augmentation systems, GPS receivers can pinpoint locations to within a few centimeters.[8]

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[7] This illustration is taken from Marshall Brain & Tom Harris, *How GPS Works*, http://download.intel.com/corporate/education/emea/eng/za/elem_sec/tools_resources/plans/gps/lessonplans/unit_support/educator_support/How_GPS_works.pdf (last visited Oct. 2, 2011).

[8] The accuracy of GPS data has increased in recent years due to use of the FAA's supplemental Wide-Area Augmentation System program and the Coast Guard's Nationwide Differential GPS program. Receivers can improve accuracy to pinpoint precision by using differential GPS, which involves fitting a known, fixed point with a receiver, and comparing information from the fixed receiver with information from the roving receiver. *See* Department of Defense, Defense Science Board Task Force, *The Future of the Global Positioning System* 10 (2005), *available at* http://www.acq.osd.mil/dsb/reports/ADA443573.pdf;

GPS receivers can be extremely small and inconspicuous. For example, the California-based company Telemetry Solutions manufactured the "world's smallest GPS receiver," which weighs 10 grams—approximately the weight of four pennies—and includes a receiver, a battery, and a system enabling data to be downloaded wirelessly. Christopher Mims, *GPS Receivers Now Small Enough to Attach to Almost Anything*, Technology Review (Aug. 5, 2011), *available at* http://www.technologyreview.com/blog/mimss-bits/27134/. Because they are extremely light and durable, researchers have even used them to monitor fruit bats in the wild without interfering with their flight. *Ibid.*[9]

Receivers can be battery operated, such as the device used in this case,[10] or can be attached to a power source, such as a car's electrical system, in which case they can run indefinitely. See, *e.g.*, *State* v. *Jackson*, 76 P.3d 217, 221 (Wash. 2003) (describing GPS tracking devices that drew power from the target vehicles' electrical systems rather than their own batteries).[11] Other devices are solar-powered

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GPS Accuracy, http://www.gps.gov/systems/gps/performance/accuracy/ (last visited Oct. 2, 2011).

[9] Technology continues to improve. The company now offers a GPS receiver weighing eight grams that is solar powered. See *Wildlife GPS Collars with Wireless Data Transfer*, Telemetry Solutions, http://www.telemetrysolutions.com/track-wildlife/small-mammal-gps-collars.php (last visited Oct. 2, 2011).

[10] The device was battery powered, and would go into "sleep" mode while the vehicle was stopped in order to conserve battery power and enable it to function without recharging for longer periods of time. J.A. 84.

[11] See also *Spark Nano 2.0 Real-Time GPS Tracker*, Brickhouse Security, http://www.brickhousesecurity.com/covert-small-gps-tracking-device.html (last visited Oct. 2, 2011) (compact bat-

and thus do not require any maintenance after installation. *Solar Power Intensifies GPS Data Sets*, Telemetry Solutions, http://www.telemetrysolutions.com/track-wildlife/small-solar-powered-gps-devices.php (last visited Oct. 2, 2011).

Moreover, novel methods of attaching GPS receivers require no human contact with the vehicle being tracked. The Los Angeles Police Department has tested an "air-propelled miniature dart equipped with a global positioning device" that enables officers to tag cars as they pass. Richard Winton, *LAPD Pursues High-Tech End to High-Speed Chases*, L.A. Times, Feb. 3, 2006, at B1, *available at* http://articles.latimes.com/2006/feb/03/local/me-bratton3. As the Los Angeles police chief emphasized, "Instead of us pushing them doing 70 or 80 miles an hour * * * this device allows us *not to have to pursue after the car*." *Ibid.* (emphasis added).

The location information calculated by a GPS receiver may be stored in the receiver or transmitted to a remote computer using radio or mobile phone technology—all without any human involvement. See Dep't of Justice, Nat. Inst. of Justice, *Investigative Uses of Technology: Devices, Tools, and Techniques* 13 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/213030.pdf.[12]

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tery-powered 3-inch by 2-inch GPS tracker); *Livewire ATX: Hardwired GPS Vehicle Tracking System*, Brickhouse Security, http://www.brickhousesecurity.com/gps-gsm-tracker.html (last visited Oct. 2, 2011) (GPS system that "runs on the car's power so there's no batteries to replace").

[12] The descriptions of GPS devices in various lower court opinions highlight the different methods used to capture data from the devices. See, *e.g.*, *United States* v. *Cuevas-Perez*, 640 F.3d 272, 275 (7th Cir. 2011) (noting the GPS device was capable of

Once the information is transmitted to a computer, it can be transformed, using mapping software, into a visual depiction of the vehicle's precise route. Because a GPS receiver typically recalculates its location every five to ten seconds, such a mapping program can graphically plot those locations to reproduce the receiver's movements over time. Severin L. Sorensen, *SMART Mapping for Law Enforcement Settings: Integrating GIS and GPS for Dynamic, Near Real-Time Applications and Analysis*, in *Crime Mapping and Crime Prevention* 349 (David Weisburd & Tom McEwen eds.,1998) *available at* http://www.popcenter.org/library/crimeprevention/volume_08/12-Sorensen.pdf (discussing the incorporation of GPS technology into law enforcement crime mapping analysis).

GPS thus supplies users with "accurate, continuous, worldwide, three-dimensional position and velocity information." *Understanding GPS*, *supra*, at 3; see also Global Positioning System, *What is GPS?*, GPS.gov, http://www.gps.gov/systems/gps (last visited Oct. 2, 2011). When combined with a mapping program, the location information produces a complete real-time depiction of everywhere the GPS receiver—and therefore the vehicle or person to which that receiver is attached—has been. And once a re-

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sending "minute-by-minute messages to its operator remotely"); *United States* v. *Pineda-Moreno*, 591 F.3d 1212, 1213 (9th Cir. 2010) (GPS devices "permitted agents to access the information remotely, while others required them to remove the device from the vehicle and download the information directly"); *Morton* v. *Nassau Cnty. Police Dep't*, 2007 WL 4264569, at *1, No. 05-CV-4000(SJF)(AKT)(E.D.N.Y. Nov. 27, 2007) ("The GPS transmitter has a cellular modem component that permits remote access to the stored tracking information and current location of the transmitter.").

ceiver has been planted on a car, the police may playback or monitor all of this tracking data in real time, from their stationhouse or anywhere else connected to the Internet.[13]

B. Beeper-Assisted Surveillance

A beeper is "a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *Knotts*, 460 U.S. at 277. By using a receiving device to monitor signals from a beeper—also termed a "radio direction finder" or "bird dog"—an individual can determine the beeper's general direction relative to the receiver's location. Jerry L. Dowling, *"Bumper Beepers" and the Fourth Amendment*, Crim. L. Bull., Jul.-Aug. 1977, at 266-267.

An article written for law enforcement officials in the early 1970s explained the process of monitoring beeper transmissions. See William Shaw, *Miniature Tracking Transmitters*, L. & Order, Jan. 1973, at 24.

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[13] A former narcotics detective with the Chesterfield County Police Department in Chesterfield, Virginia, explained:

> [T]he GPS unit can be programmed to transmit an electronic signal via a cell tower to a base unit approximately every five seconds. The officer monitoring it can determine the latitude and longitude of the vehicle, tell how long the vehicle remains at its location, view a computer screen containing a map of the area where the vehicle is located, and see where the vehicle is headed—all without leaving police headquarters.

Rob Cerullo, *GPS Tracking Devices and the Constitution*, 71 Police Chief, no. 1, Jan. 2004, *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=179&issue_id=12004.

The receiving apparatus consisted of a receiving antenna and a radio frequency detector. *Id.* at 25. The receiving antenna was used to find the direction of the beeper by manually turning the antenna by hand to determine the direction from which the beeper signal originated. *Id.* at 29 ("There are direction finding loop antennas available that could provide an indication of direction but the loop must be turned manually to 'home' in on the signal source.").

Officers could attach an additional antenna to the monitoring car, so that one antenna would be on the right side and the other would be on the left. See Robert M. Brown, *The Electronic Invasion* 87 (1967) (*Electronic Invasion*). By noting which antenna received the strongest signal, the officers could determine whether the target was to the right or left of the police car.

An officer could roughly estimate the approximate distance between the receiver and the beeper by using an add-on device called a relative signal strength ("S") meter. *Id.* at 88; see also Jerry L. Dowling, *supra*, at 266, 268. This device connected to the FM monitor receiver and measured the intensity of the beeps. *Electronic Invasion supra*, at 88. Some agents believed that their ears were more reliable than the best S-meters, and therefore spent "months" training themselves "to listen for slight variations in the loudness of the target car's beeps." *Id.* at 89.

Under normal operating conditions, a beeper's signal could be monitored from a distance of two to four miles on an open road and up to twenty miles in the air. In congested urban areas, the range could drop to about two blocks. See Reply Br. for United States at 14-15 n.6, *United States* v. *Karo*, 468 U.S. 705 (1984). In addition to the obstructions present in

an urban environment, the object that the beeper was attached to or hidden in could also interfere with the signal. William Shaw, *supra*, at 28 ("[I]f the transmitter is hidden under a fender or inside the vehicle you may find that vehicle's body acts as a shield, thereby greatly reducing the transmitting range.").

Neither beepers nor the receivers used to monitor them can by themselves ascertain or store the beeper's location. Rather—because a beeper is limited to providing a real-time indication of its location *relative* to the person monitoring through use of the directional finder—"beepers are used to supplement visual surveillance—a stopgap in case visual contact with the suspect is lost." Jerry L. Dowling, *supra*, at 266, 269.

C. Critical Differences Between GPS Tracking and Beeper-Assisted Surveillance

There are several important differences between GPS tracking and surveillance assisted by a *Knotts*-type beeper.

1. GPS tracking is an automated process wholly divorced from human observation that employs technology unrelated to visual surveillance.

Beeper-assisted surveillance requires a police officer to follow the targeted vehicle, for the duration of the surveillance, in order to ascertain the vehicle's location. That is because the beeper and receiver function only as directional finders, indicating the vehicle's direction relative to the receiver, and thereby aiding in visual surveillance by pointing the police in the direction of the vehicle. The vehicle's actual lo-

cation can be determined only through the police officer's observations.

Thus, the *Knotts* Court explained that "officers followed the car in which the [beeper] had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper." 460 U.S. at 278. The officers "lost the signal from the beeper, but with the assistance of a monitoring device located in a helicopter the approximate location of the signal was picked up again about one hour later." *Ibid.*

A beeper enhances the effectiveness of real-time visual surveillance by enabling police officers to confirm that the vehicle that they see is the vehicle being tracked and providing a means of re-establishing visual surveillance. If officers become separated from the vehicle by more than a few miles, however, they must criss-cross the area until they pick up the beeper signal again.

GPS tracking, by contrast, does not require any visual surveillance by police officers after the receiver has been installed. Instead, the receiver automatically calculates its location once every ten seconds. A police computer receiving that information through a cell phone connection then uses a mapping program to plot the receiver's—and therefore the vehicle's—location. The technology enables the police to monitor and record the vehicle's location without ever observing or following the car themselves.

Moreover, GPS tracking produces this information by using a technology completely unrelated to—and wholly different from—visual surveillance of a vehicle or individual. As we have explained (at pages 7-14, *supra*), GPS tracking information is generated

through the combined operation of four components: a multi-billion dollar system of satellites owned and operated by the U.S. Department of Defense; a small receiver that uses the satellites' transmissions to calculate latitude, longitude and altitude on a precise and continuous basis; a cell phone that transmits those coordinates to a police computer; and mapping software that converts those coordinates into human-intelligible information by plotting them on a map and storing them for further analysis and presentation. Visual surveillance of the GPS device or of the vehicle to which it is attached—whether by humans or by cameras that replicate human observation—is completely unnecessary to this process.

2. ***GPS tracking produces evidence that is not based in any way upon human surveillance.***

When an officer uses a beeper to assist him in following a vehicle, the beeper and its receiver do not produce data that subsequently is—or can be—presented in court. The beeper's audio signals are relayed in real-time, and communicate only crude approximations of the vehicle's direction and distance at any given moment relative to the receiver being monitored by the police officer.

At trial (or in a subsequent warrant application), it is the *officer* who testifies to what he heard and what he saw. His observations remain the only evidence of the vehicle's location.

A GPS receiver, on the other hand, calculates its longitude, latitude, and altitude coordinates and either records that data or transmits it to a police computer. The evidence is those coordinates them-

selves—or, more frequently, a map of the vehicle's movements created with mapping software.

3. ***GPS tracking produces evidence much more precise and detailed than the evidence resulting from beeper-assisted surveillance.***

a. If an officer employing beeper-assisted surveillance is following the target vehicle at a distance of one mile—and therefore is not maintaining visual surveillance of the vehicle—he or she will not be able to determine precisely where the vehicle is, only its approximate direction and distance relative to the receiver. And if the officer loses the beeper signal, he or she will not even know the vehicle's approximate direction and location. An officer's ability to record all of a vehicle's locations using beeper-assisted surveillance thus depends entirely on the officer's ability to maintain visual surveillance of the vehicle.

GPS tracking, on the other hand, automatically compiles a precise—and highly detailed—record of the vehicle's location at ten-second intervals for the entire period that the GPS receiver is operational. That provides a far more thorough and detailed account of the vehicle's location than any officer conducting beeper-assisted surveillance could possibly compile. In this case, for example, the government's GPS evidence consisted of more than two thousand pages of location data. J.A. 109-110, 128.

b. The ability of GPS tracking to identify the precise location of a vehicle over time has another, entirely independent, significant consequence—the resulting data can be used by law enforcement officers to generate information concerning extremely private aspects of a person's life.

Probabilistic models of a user's activity can be generated by combining the knowledge of what businesses are near any given location (gleaned from a simple Internet search) with the frequency of a tracked vehicle's visits to that location. *Cf.* Ramaswamy Hariharan, John Krumm & Eric Horvitz, *Web-Enhanced GPS*, 3479 Lecture Notes in Computer Sci. 301 (2005). For instance, the fact that a tracked car suddenly began stopping at an oncologist's office several times a month could reveal that a member of the family had cancer. The buildings that a person regularly visits could reveal his religious or political affiliations.

The MIT Reality Mining study tested the ability of tracking technology to divulge more than merely people's locations. Among other things, the study was able to show that a person's "workplace colleagues, outside friends, and people within a user's circle of friends" could be "identified with over 90% accuracy" based on common-sense heuristics (*e.g.*, "office acquaintances are frequently seen in the workplace, but rarely outside the workplace.") *Relationship Inference*, MIT Media Lab: Reality Mining, http://reality.media.mit.edu/dyads.php (last visited Oct. 2, 2011).[14]

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[14] Computer models also make it possible to predict a person's movements in the future based on their past patterns. See Nathan Eagle, Aaron Clauset & John A. Quinn, *Location Segmentation, Inference and Prediction for Anticipatory Computing*, MIT Media Lab: Reality Mining, http://reality.media.mit.edu/pdfs/anticipatory.pdf (last visited Oct. 2, 2011).

*4. **GPS tracking can be conducted around-the-clock for extensive periods of time.***

Beeper-assisted surveillance for anything other than a short period of time requires significant personnel and other resources. Because police officers must follow the target in real-time, a team of officers, equipped with a police car, receiver and other necessary equipment, must be assigned to each beeper twenty-four hours a day, seven days a week.

Moreover, the practical limitations of beeper-assisted surveillance limit even medium-term monitoring. It is inevitable that the officers will lose visual contact with the vehicle at various points, and therefore will be unable to be certain of the vehicle's precise movements during some, or even a substantial part, of the period of surveillance.

GPS tracking has no such limitations. Once the receiver is installed, the data collection is automatic and requires no real-time human monitoring. The only limitation is the duration of the receiver's power supply and—as discussed above (pages 11-12, *supra*)—there are an increasing number of options that provide an effectively unlimited power supply. Around-the-clock long-term tracking is realistically possible through, and only through, the use of GPS tracking.

*5. **GPS tracking can be used simultaneously on very large numbers of vehicles and individuals.***

The inherent limitations of beeper-assisted surveillance just discussed also limit the number of vehicles that law enforcement officials can follow using that technology. It simply would not be possible to

assign large numbers of officers to monitor beepers given the other demands on law enforcement.

The GPS system can accommodate an unlimited number of receivers. *Understanding GPS*, *supra*, at 3. And, because GPS tracking requires no target-specific commitment of personnel resources, it can be deployed on a widespread basis. The resulting data could be stored and analyzed using computers whenever law enforcement officials wished to gain information about a specific person or persons.

Indeed, given the shrinking size of GPS receivers, the day is not far off when a State could simply embed a GPS device in every license plate that it issues, so that tracking data would be available to police officers whenever they wished to ascertain the movements of a particular vehicle during a specified period of time.

And nothing limits the installation of GPS receivers to vehicles. As receivers shrink in size, it will be possible to install them in a person's clothing (for example, in a shoe, or the lining of a suit or other garment), or in a pocketbook or briefcase. Because the tracking does not require any physical surveillance by law enforcement officers, the government would be able to use the technology to track the movements of large numbers of individuals even more directly and precisely than through the attachment of a GPS receiver to a vehicle.

The large-scale monitoring that is a practical impossibility based on beeper-assisted surveillance is now a realistic possibility with GPS tracking.

II. THE CRITICAL DIFFERENCES BETWEEN GPS TRACKING AND BEEPER-ASSISTED SURVEILLANCE LEAD TO DIFFERENT RESULTS UNDER THE REASONABLE EXPECTATION OF PRIVACY STANDARD.

The threshold question in determining whether government conduct constitutes a search within the meaning of the Fourth Amendment is whether the conduct (1) encroaches upon a person's "actual (subjective) expectation of privacy," and (2) "the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The government does not dispute the first issue. The question here is whether Jones's expectation that he would not be subject to the intrusion resulting from GPS tracking is reasonable.

The government's entire argument rests on a single point: that a person's vehicle is subject to visual observation when it travels on public roads. This Court's precedents make clear, however, that the protections of the Fourth Amendment apply even in public places. Because the information generated by GPS tracking is fundamentally different from what may be obtained through human observation—in its precision, in its duration, in its scope, and in the means by which it is collected—GPS tracking constitutes a search within the meaning of the Fourth Amendment.

A. The Court's Precedents Establish That GPS Tracking Intrudes On Individuals' Reasonable Expectation of Privacy.

An individual does not lose all privacy protection simply by appearing in public. As the Court recognized in *Katz*, what a person "seeks to preserve as

private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351.

For example, the Fourth Amendment limits the circumstances in which a person in public may be subjected to a physical search. *Terry* v. *Ohio*, 392 U.S. 1 (1968). The same is true of a package carried by a person in public. *E.g.*, *Bond* v. *United States*, 529 U.S. 334, 338-339 (2000) (officer's tactile inspection of a bag constituted a search because no one "expect[s] that other passengers or bus employees will * * * feel the bag in an exploratory manner").

Even a sniff by a dog interferes with reasonable expectations of privacy unless the dog is trained to detect only the presence of contraband. *Illinois* v. *Caballes*, 543 U.S. 405, 409-410 (2005); *United States* v. *Place*, 462 U.S. 696, 707 (1983); see also *United States* v. *Jacobsen*, 466 U.S. 109, 124 n.24 (1984) ("[T]he *reason* [the dog sniff] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items.").

This Court has found no interference with individuals' reasonable expectation of privacy in a public place only where the government conduct consisted of actual physical observation by law enforcement officers—in some cases augmented by technology that enhanced the officers' powers of observation. Thus, the Court has upheld the use of searchlights, binoculars, and similar devices. See, *e.g.*, *United States* v. *Lee*, 274 U.S. 559, 563 (1927).

That is the principle that was applied in *Knotts*. Observing that the officers "relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [the] automobile to the police re-

ceiver," the Court stated that "[n]othing in the Fourth Amendment prohibited the police from ***augmenting the sensory faculties bestowed upon them at birth*** with such enhancement as science and technology afforded them in this case." 460 U.S. at 282 (emphasis added).

The government's argument here requires the Court to move far beyond this principle. The government contends that as long as one individual fact is susceptible to human observation in a public place—such as a person's location at a particular moment in time—the government may use any means to monitor and record the person's location on a continuous basis. Especially in this era of rapid advances in technology, the Court should refuse to grant what would amount to a blanket exclusion from Fourth Amendment review of the government's use of large categories of new technologies.

GPS tracking triggers application of the Fourth Amendment for two reasons. First, it is a wholly automated process unrelated to human observation that generates information fundamentally different from—and far more precise and extensive than—human surveillance of the type that a person would reasonably expect. Second, even if GPS tracking were deemed merely to augment human surveillance, its precision and persistence is such that, based on the standards for technological enhancement applied in this Court's cases, its use intrudes on individuals' reasonable privacy expectations.

One additional element is relevant to the Fourth Amendment analysis: the extent to which the intrusion on reasonable privacy expectations is effectuated through a physical intrusion on the individual's property. The Court relied heavily on this factor

in *Silverman* v. *United States*, 365 U.S. 505 (1961). There, the government monitored conversations by use of a "spike mike," which worked by "ma[king] contact with a heating duct serving the house occupied by the petitioners thus converting their entire heating system into a conductor of sound." 365 U.S. at 506-507. The Court found the Fourth Amendment applicable because the government's action "usurp[ed] part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent." *Id.* at 511.

Precisely the same analysis applies here. Installation of a GPS receiver converts an individual's car into a source of information about that individual. When that occurs without the owner's consent, this factor weighs heavily in favor of Fourth Amendment protection.

1. ***GPS tracking infringes reasonable expectations of privacy because the information is collected through means wholly unrelated to human observation and is more precise and more comprehensive than what can be obtained from human observation.***

This Court's decisions holding the Fourth Amendment inapplicable to government actions collecting information in public places rest on two critical factors, neither of which applies to GPS tracking.

First, where the Court has found no intrusion on reasonable expectations of privacy, the information was obtained through human observation, sometimes augmented by technological means. *Knotts*,

460 U.S. at 282; see also *Dow Chemical Co.*, 476 U.S. at 238 (aerial camera merely "enhanced" vision and did not exploit "some unique sensory device * * * but rather a conventional, albeit precise commercial camera commonly used in mapmaking").

GPS tracking, by contrast, does not involve *any* human observation, and the resulting evidence is made up of computer-generated data and not human observations. See pages 9-14 & 18, *supra*. "Unlike binoculars or a flashlight, the GPS device does not merely augment the officers' senses, but rather provides a technological substitute for traditional visual tracking." *Jackson*, 76 P.3d at 223.

GPS tracking is therefore fundamentally different from beeper-assisted surveillance and, under the Court's cases, that difference compels a different outcome. GPS tracking infringes individuals' reasonable privacy expectations. *Cf. Kyllo*, 533 U.S. at 33, 34 (use of thermal imager that revealed infrared radiation invisible to the human eye was "more than naked-eye surveillance" and constituted a search).[15]

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[15] The *Kyllo* Court indicated that the use of thermal imaging technology constituted a search "at least where (as here) the technology in question is not in general public use." 533 U.S. at 28. It did not hold the opposite—that there would never be a search if the technology is "in general public use"; the Court did not reach that question.

We submit that the "not in general public use" criterion is not the only standard by which to judge a technology's Fourth Amendment significance. It is especially inappropriate where the technology does not merely augment human observation but rather operates entirely without human observation. Given the trends in technology, considering only whether a technology is in general public use would have the inevitable result of "shrink[ing] the realm of guaranteed privacy," *Kyllo*, 533 U.S.

Second, in this Court's prior cases finding no intrusion on reasonable expectations of privacy, the information collected was not different in precision, scope, or quantity from what could be obtained through human observation. In *Dow Chemical*, for example, the Court held that the aerial photography "was not so revealing of intimate details as to raise constitutional concerns." 476 U.S. at 238; see also *id.* at 238 n.5 ("No objects as small as ½-inch in diameter such as a class ring * * * are recognizable, nor are there any identifiable human faces or secret documents captured in such a fashion as to implicate more serious privacy concerns.").

Again, GPS tracking is fundamentally different. It enables the collection of much more detailed and precise information over much longer periods of time than would be possible through human observation, even human observation assisted by a beeper or other technologies. See pages 9-14 & 19-22, *supra*.

GPS tracking "is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period." *People* v. *Weaver*, 12 N.Y.3d 433, 441, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (N.Y. 2009). For that reason as well it constitutes a search under the Fourth Amendment.

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at 34, because many technologies have beneficial impacts on society unrelated to government surveillance.

In any event, as we discuss below (at pages 29-30, *infra*), GPS tracking technology as used by the government here does not fall within any "general public use" exception.

2. *Even if GPS tracking were deemed to augment human observation, it infringes reasonable expectations of privacy.*

GPS tracking would trigger the Fourth Amendment's protections even if it could be characterized as merely augmenting human surveillance. This Court has made clear that technological augmentation of human observation infringes reasonable expectations of privacy if the gathering of the information could not be "readily duplicate[d]" by a member of the public at large, because the relevant technology is not "in general public use"; or if the information obtained by the government reveals "intimate details" not detectable through ordinary human observation. *Dow Chemical*, 476 U.S. at 231, 238; see also *Kyllo*, 533 U.S. at 35 n.2, 39 n.6. GPS tracking infringes both of these limitations.

The standard for determining whether the government's information-gathering may be "readily duplicate[d]" is whether members of the public could use the technology to obtain the same information. *Kyllo*, 533 U.S. at 39 n.6 (quoting *California* v. *Ciraolo*, 476 U.S. 207, 215 (1986)) ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."); *Dow Chemical*, 476 U.S. at 231 ("The photographs * * * are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them.").

Members of the public cannot routinely employ GPS technology to track a vehicle without the own-

er's consent. To the contrary, affixing a GPS receiver to a car or a person without consent would constitute a tort under the common law of most if not all States, and several States have specifically prohibited the private use of tracking technology. See, *e.g.*, Cal. Penal Code § 637.7 (declaring "electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy" and making illegal the "use of an electronic tracking device" by anyone other than law enforcement officials); Haw. Rev. Stat. § 803-42a (same).

The intrusion effected by government GPS tracking therefore is not at all "routine" (*Kyllo*, 533 U.S. at 39 n.6) and cannot legitimately be "readily duplicate[d]" by the public. Indeed, in contrast to beepers (*Knotts*) and airplanes (*Dow Chemical*), the government itself owns the entire GPS satellite network and exclusively controls public access to it. For these reasons alone, the use of GPS technology to conduct covert monitoring of a person constitutes a search within the meaning of the Fourth Amendment.

Moreover, the information obtained from GPS tracking does reveal intimate details not detectable through ordinary human observation. As explained above, the GPS mapping software allows not only the plotting of coordinates on a map but also their association with the names of businesses at those addresses. The police could thus infer an individual's political or group affiliations based on the meetings they attend, their medical histories based on the doctors they visit, and their most intimate associates—information that most people reasonably expect to remain private and that implicates other constitutional rights. *Cf. NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). For that reason as well, the

use of this technology triggers the protections of the Fourth Amendment.

B. The Fact That Some Information About An Individual's Travels In Public May Be Collected Through Human Surveillance Does Not Preclude A Reasonable Expectation Of Privacy For More Precise, Detailed, And Comprehensive Information.

The government contends that because a police officer could observe respondent's vehicle at any one particular location, respondent has no reasonable privacy expectation in *any* information relating to the location of the vehicle. That contention is wrong for two reasons.

To begin with, the information obtained through GPS tracking is fundamentally different from information that human surveillance could possibly produce—in terms of its precision, detail, and scope. See pages 9-14 & 19-22, *supra*. Because the two sets of information are not at all equivalent, the government's argument must be rejected at the outset because it rests on a false factual predicate.

Even if the two sets of information were reasonably equivalent, the government's argument would fail on legal grounds. This Court has squarely rejected the contention that simply because some information *could be* uncovered using a legal means, a more intrusive means to obtain it does not violate a person's reasonable expectations of privacy. See *Kyllo*, 533 U.S. at 35 n.2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.").

In *Kyllo*, the government argued that the temperature inside the house could be ascertained by lawful means, such as observing melting snow on the roof, and that therefore the thermal imaging was permissible. The Court stated:

> [C]omparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home * * * is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful.

Id. at 35 n.2. The crucial factor for Fourth Amendment analysis is the means of surveillance actually used by the police, not the hypothetical means they might have used.

The Court reached the same conclusion in *Silverman*. The government relied on precedents holding that the Fourth Amendment was not violated by using devices that assisted in monitoring conversations occurring on the other side of a wall. But, because the spike mike had penetrated the boundaries of the home itself, the Court held the means used by the government triggered the Fourth Amendment. *Silverman*, 365 U.S. at 509-510 ("Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other * * * means did not amount to

an invasion of Fourth Amendment rights."); see also *Katz*, 389 U.S. at 352 (fact that contents of conversation might be discerned by a lip-reader or overheard by a passer-by did not affect reasonable expectations of privacy).

Here, therefore, the possibility that human observation might be able to produce information similar to GPS tracking does not mean that individuals cannot have a reasonable expectation of privacy from GPS tracking.

There are two important reasons for this rule. First, it often will be difficult for the Court to determine whether one method of information gathering does in fact generate the same type of data as another. Judging each method on its own terms avoids that uncertain inquiry.

Second, simply because human observation may collect *some* information in a particular category does not mean that human observation is capable of collecting such information comprehensively. This case perfectly demonstrates the distinction. Officers may be able to collection some information regarding an individual's location, but that does not mean that human observation is capable of collecting location information with the continuous detail of GPS tracking. Focusing on the distinct means used by the government avoids embroiling the Court in analogies that are wholly inapposite.[16]

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[16] The government suggests (U.S. Br. 50) that this case simply concerns the efficiency with which law enforcement authorities conduct investigations—"the information that the tracking device reveals about the vehicle's location could also be obtained (albeit less efficiently) by means of visual surveillance." That is false. As we have explained (at pages 9-14 & 19-22, *supra*), the

C. Requiring A Warrant Will Not Impose A Significant Burden On Law Enforcement.

The issue before the Court in this case is not whether GPS tracking *ever* may be used by the government. Rather, it is whether the government must obtain a warrant in order to employ this technology. As in *Karo*, the government's position "is based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of a warrant." 468 U.S. at 717.

Claims about the onerousness of a warrant requirement ring especially hollow here, because the police did in fact secure a warrant. *Cf. id.* at 718 ("It is worthy of note that, in any event, this is not a particularly attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained in this case."). The current dispute arises only because the officers failed to comply with the warrant's terms. J.A. 21-34, 100-101, 105-110.

Nor is the issuance of the warrant here unique. Reported decisions indicate that warrants authorizing GPS tracking have been sought and obtained in other jurisdictions as well. *See, e.g.*, *United States* v. *Williams*, 650 F. Supp. 2d 633, 638 (W.D. Ky. 2009); *United States* v. *Yokshan*, 658 F. Supp. 2d 654, 658 (E.D. Pa. 2009); *Commonwealth* v. *Connolly*, 454 Mass. 808, 810, 913 N.E.2d 356, 360 (Mass. 2009); *State* v. *Sveum*, 328 Wis. 2d 390, 378, 787 N.W.2d

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information produced by GPS tracking is significantly different in precision, detail, and duration from what may be gathered through visual surveillance. Those differences are one of the principal reasons why GPS tracking cannot be analogized to beeper-assisted surveillance for purposes of the Fourth Amendment.

317, 321 (Wis. 2010), cert. denied, 131 S. Ct. 803 (2010); *State* v. *Scott*, A-0039-04T4, 2006 WL 2640221 (N.J. Super. Ct. App. Div. Sept. 15, 2006) ("Although the order * * * authorizing the installation of the GPS tracking device was not designated as a search warrant, the parties implicitly agreed below that the propriety of the order be determined by the standard of 'probable cause.'").[17]

More generally, there is little evidence that warrant requirements have proven difficult to satisfy. Law enforcement officers applied for 3,195 warrants authorizing wiretaps during 2010. All but one was granted. *Report of the Director of the Administrative Office of the United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications* 31, *available at* http://www.uscourts.gov/Statistics/WiretapReports/WiretapReport2010.aspx; see also Richard Van Duizend *et al.*, National Center for State Courts Report, *The Search Warrant Process: Preconceptions, Perceptions, and Practices* 3.172 (1985), *available at* http://www.cwsl.edu/content/benner/the%20Search%20warrant%20process.pdf ("Magistrates rarely deny an application for a search warrant.").

Law enforcement authorities often complain about the effect of a warrant requirement in the con-

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[17] Indeed, when federal agents seek GPS tracking data from cellphone providers, "the Criminal Division of the Justice Department recommends the use of a warrant based on probable cause." Statement of James A. Baker, Associate Deputy Attorney General, Before the Committee on Judiciary, U.S. Senate, April 6, 2011, *available at* http://judiciary.senate.gov/pdf/11-4-6%20Baker%20Testimony.pdf.

text of exigent circumstances—where police officers must act immediately based on facts that they learn, or risk losing the suspect or the evidence. But planning is an essential part of the process of using GPS tracking: the officers must identify a target vehicle and determine how to place the GPS receiver on the vehicle, and wait until the vehicle is unattended and their actions in placing the device will be unobserved. Obtaining a warrant in conjunction with this planning process is unlikely to impose a significant burden.

In the event exigent circumstances did arise, applying the Fourth Amendment to GPS tracking would carry with it the exceptions to the Fourth Amendment's warrant requirement based on hot pursuit and other emergencies.

On the other side of the balance, the Court has recognized that the point of the warrant requirement

> is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. *United States*, 333 U.S. 10, 14 (1948). That protection is especially important in view of the dramatically intrusive nature of GPS tracking as well as the ease with which the technology can be deployed on a widespread basis.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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UNITED STATES,

Petitioner,

v.

ANTOINE JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE [1]

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal matters through academic research, litigation, and participation in the formulation of public policy. The Center regularly comments on issues of broad importance to the administration of the criminal justice system.

The questions presented here are ones of significant practical import in the daily enforcement and administration of criminal law by federal and state law enforcement officers. The case requires the Court to answer those specific questions against the broader backdrop of evolving technology—here, global positioning systems—capable of contributing not only to crime detection and prevention, but also to government cost savings in trying financial times.

The Center has a strong interest in such legal and policy matters and files this *amicus* brief to aid the Court in its review of the D.C. Circuit's decision. The Center supports the position of the United States and accordingly urges the Court to reverse the D.C. Circuit's holding that law enforcement's month-long use of a GPS tracking device violated petitioner Antoine Jones's Fourth Amendment rights.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* represents that all parties have consented to the filing of this brief.

BACKGROUND

A 2004 joint narcotics investigation conducted by the Federal Bureau of Investigation and the Metropolitan Police Department focused on Antoine Jones and the "Levels" nightclub he owned in the District of Columbia. The investigation included the installation of a GPS tracking device on Jones's car while parked in a public parking lot. Police later replaced the device's battery while Jones's car again was parked in a public parking lot. Following indictment on a federal narcotics conspiracy charge, Jones moved to suppress the information obtained from the GPS device. The district court denied the motion, and an ensuing jury trial ended with Jones being convicted and sentenced to life imprisonment. *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010).

The D.C. Circuit reversed the conviction, holding that the warrantless use of a GPS device to track Jones's public movements violated the Fourth Amendment. Distinguishing *United States v. Knotts*, 460 U.S. 276 (1983), as a case involving electronic surveillance of discrete travel for approximately 100 miles, the D.C. Circuit panel held that the police's continuous use of a GPS device "over the course of a month" revealed a totality of information about Jones that was "not exposed to the public" because the "likelihood anyone will observe all those movements is effectively nil." *Maynard*, 615 F.3d at 558. "A reasonable person," the court explained, "does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those

movements to remain disconnected and anonymous." *Id.* at 563 (citation and internal quotations omitted).

Although this Court granted review on the question, the D.C. Circuit panel did not address Jones's alternative argument that the warrantless installation of the GPS violated the Fourth Amendment.

SUMMARY OF ARGUMENT

The ubiquitous challenge for law enforcement is to find improved and more cost-effective ways to detect and prevent crime. The use of new technology is one way to help answer the challenge. While the financial savings alone can be significant, the potential for crime reduction may be even greater where, as here, a particular type of technology (GPS locational tracking) affords law enforcement the opportunity to strategically increase its presence in communities and thereby better allocate resources, including physical surveillance teams, to matters of priority focus. Far from theoretical, this conclusion finds support in empirical assessments of the factors contributing to certain crime reductions in recent years. This case presents the Court an opportunity to reinforce the point by applying settled Fourth Amendment principles to uphold law enforcement's use of a new means of technology to conduct non-intrusive surveillance of vehicles in public places.

The D.C. Circuit invalidated the month-long use of GPS locational tracking on reasoning not only in considerable tension with *Knotts*, but also on the basis of an aggregation principle that puts law enforcement in the practical predicament of having to gauge when the daily parts of surveillance sum to a whole that triggers the warrant requirement. This

result is as unworkable as it is unnecessary in the setting of GPS surveillance on public streets, where the only information yielded is locational information—the whereabouts of a car—not what an individual does or says in any particular place. The Fourth Amendment is able to accommodate the uses of such new technology while protecting the traditional lines of privacy marked in the Court's precedent.

Accordingly, the Center supports the position of the United States and urges the Court to hold that the warrantless installation in a public place of a GPS device on a car's exterior, as well the subsequent use of the device to track locational information on public roadways, does not violate the Fourth Amendment.

ARGUMENT

I. THE USE OF A GPS DEVICE TO CONDUCT LOCATIONAL SURVEILLANCE OF MOVEMENTS IN PUBLIC PLACES DOES NOT VIOLATE THE FOURTH AMENDMENT.

Like the D.C. Circuit, the parties recognize that the answer to the question presented on the use of the GPS tracking device turns upon whether the reasoning of *Knotts* extends to this form of electronic surveillance. The Center agrees with the Solicitor General's view that the primary rationale of *Knotts*—specifically, that an individual had no reasonable expectation of privacy in movements on public roads and thus the use of an undisclosed beeper to track those movements did not constitute a search under the Fourth Amendment—should control here. On

this score, the Center wishes to highlight three interrelated points.

First, the D.C. Circuit erred in framing a central dimension of its analysis in terms of "what a reasonable person expects another might actually do." *Maynard*, 615 F.3d at 559 (citing *California v. Greenwood*, 486 U.S. 35, 40 (1988); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986); *Florida v. Riley*, 488 U.S. 445, 450 (1989)). The panel cast its holding in these same probability terms: "the likelihood a stranger would observe all those movements [on public streets over a month] is not just remote, but it is essentially nil." *Id.* at 560. Nothing in *Knotts* compels this "likelihood" or probability inquiry, and no aspect of the Court's reasoning hinged on whether Leroy Knotts thought it likely Minnesota narcotics officers would use an electronic beeping device to follow his co-defendant across state lines to Knotts's cabin 100 miles away in Shell Lake, Wisconsin.

The same reasoning applies to the facts in *Greenwood*, *Ciraolo*, and *Riley*. Those decisions did not turn on whether the respective defendants reasonably expected others to rummage through curbside trash or to fly over fenced residential backyards looking for marijuana plants. To the contrary, the Court's assessments of the reasonableness of any subjective privacy interest turned on the fact that the respective defendants exposed activity (marijuana growing) or things (household trash) to the public—thereby running a risk, however likely or unlikely, that others would see those things or such activity. *See Riley*, 488 U.S. at 450-51 (plurality opinion); *Greenwood*, 486 U.S. at 40-41; *Ciraolo*, 476 U.S. at 213-14.

In short, application of the test articulated by Justice Harlan in *Katz v. United States*, 389 U.S. 347, 360-61 (1967)—at least in the context of surveillance of activity undertaken in public—has not to date required courts to handicap the likelihood of whether an individual reasonably expected the challenged government action. *Cf. United States v. Jacobsen*, 466 U.S. 109, 122-23 & n.22 (1984) (upholding a field test on narcotics discovered by a shipping company and observing that "[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities"); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (noting that a "legitimate" expectation of privacy "means more than a subjective expectation of not being discovered").

Second, the D.C. Circuit's reasoning yields the backward result that an individual has no Fourth Amendment protected interest in the *Knotts*-like situation of one day's travel on public streets (say, as here, to engage in narcotics trafficking), but at some undefined point in time acquires a Fourth Amendment interest by continuing the conduct for a prolonged period—for example, running drug proceeds from a street corner to a stash house five days per week. To be sure, the panel was correct to observe that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance," including patterns and sequences of movements. *Maynard*, 615 F.3d at 562 & n.*. But nothing about the observation explains why repeated patterns and sequences of activity in public space should receive greater Fourth Amendment protection.

There is an air of unreality to permitting the FBI to observe a suspected al Qaeda operative drive from Queens to lower Manhattan to take pictures of the Brooklyn Bridge, but forcing the FBI to seek a warrant when it becomes clear the individual is making repeat trips via New York City streets to study the Bridge's structural support.

The Court should avoid this result by adhering to the reasoning of *Knotts* and reaffirming that individuals do not have a legitimate expectation of privacy in that which they reveal to third parties or leave open to view by others. *See Knotts*, 460 U.S. at 281-82; *accord Riley*, 488 U.S. at 449-50; *Greenwood*, 486 U.S. at 40-41; *Ciraolo*, 476 U.S. at 213-14; *Smith v. Maryland*, 442 U.S 735, 743-44 (1979). *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("[O]bjects, activities or statements that [a person] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.")

Third, a noteworthy omission in the D.C. Circuit's holding is the lack of any limiting principle. Not a word of the panel opinion explains how long is too long to monitor an individual's movement in public places. The silence will leave law enforcement officers uncertain whether they tripped the timing wire and need to get a warrant to continue street surveillance of a child predator, mob boss, or suspected terrorist. Street surveillance is the bread and butter work of law enforcement, and the panel's opinion provides no guidance on when the whole of an individual's movements on a public street exceed the sum of its individual parts. The more workable solution is to conclude that the reasoning of *Knotts* applies to the GPS locational surveillance challenged

here—surveillance that showed only movements of Antoine Jones's car on public streets in and around Washington, D.C., not what Jones did or said inside either the car or any location to which he drove.

II. THE USE OF A GPS DEVICE TO CONDUCT LOCATIONAL SURVEILLANCE ADVANCES IMPORTANT LAW ENFORCEMENT INTERESTS WITHOUT INFRINGING UPON PRIVACY RIGHTS.

A. The D.C. Circuit's Holding Risks Depriving Law Enforcement Of The Full Value Of New Technology Able To Advance Crime Detection And Prevention Efforts.

Reducing costs to increase output is a proven path to enhanced profitability. This basic economic principle applies with full force to law enforcement's efforts to more efficiently and effectively prevent and detect crime. No better example exists than *Knotts*, where the Court emphatically rejected the suggestion that the police's reliance on new technology—the tracking beeper—to supplement their visual surveillance raised a Fourth Amendment concern. "Nothing in the Fourth Amendment," the Court stressed, "prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Knotts*, 460 U.S. at 282.

The Court in *Knotts* then went further, acknowledging the broader policy point that new technology can enable more effective law enforcement:

> Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Id. at 284.

By no means is *Knotts* isolated, however. The U.S. Reports contain many examples of the Court confronting questions about the application of the Fourth Amendment to law enforcement's use of new technologies. The dividing line to date has been between technology used to reveal private information and technology used to help observe things or activity exposed and accessible to others. *Compare Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of a thermal imaging device violated the Fourth Amendment because it revealed "details of the home that would previously have been unknowable without physical intrusion"), *and United States v. Karo*, 468 U.S. 705, 714 (1984) (holding that "monitoring of a beeper in a private residence, a location not open to visual surveillance" violated the Fourth Amendment), *with On Lee v. United States*, 343 U.S. 747, 754 (1952) (rejecting Fourth Amendment challenge to the use of a radio transmitter to enhance work with an informant), *Smith*, 442 U.S. at 744-45 (upholding use of pen registers and explaining that no "different constitutional result is required because the telephone company has decided to automate [its operations]"), *Dow Chem. Co. v. United States*, 476

U.S. 227, 238 (1986) (upholding aerial mapping photography and recognizing that the use of visual enhancement technology did not create constitutional issues), *and United States v. White*, 401 U.S. 745, 753 (1971) (upholding the undercover use of a recording device and reasoning that the Court should not "erect constitutional barriers" to new technology able to yield "relevant and probative evidence which is also accurate and reliable").

The use of a GPS to conduct surveillance falls on the permitted side of the Court's line, as the device affords a new and cost-effective means of conducting locational surveillance without revealing anything an individual says, writes, or does in private or with others. In this regard, then, GPS tracking reveals only limited information while permitting law enforcement to realize the full benefits made available by new technology.

The importance of cost savings—especially in these financial times—is difficult to overstate. Hardly a day goes by without stories of acute fiscal challenges besetting one or another law enforcement agency. *See, e.g.*, Michael Cooper, *Spending Agreement Hurts Police and Fire Agencies*, N.Y. TIMES, Apr. 15, 2011, at A18; Tom Jackman, *Police Chiefs feel Pinch of Budget Cuts*, WASH. POST, Sept. 30, 2010, at A2.

Finding new ways to do the same or more with less is the unrelenting challenge for law enforcement. Compared with physical surveillance, GPS surveillance costs less and requires fewer personnel hours to execute while fully respecting the privacy divide established by this Court's precedents. As Judge Posner put the point:

> It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007) (Posner, J.), *cert. denied*, 552 U.S. 883 (2007).

B. The Savings Enabled By GPS Locational Surveillance Also Contribute To Crime Reduction.

The benefits of GPS devices extend beyond dollars and cents. GPS locational surveillance allows law enforcement to redeploy personnel that otherwise would have been used for physical surveillance. For example, the NYPD might choose temporarily to increase its physical presence around the United Nations building while using GPS tracking to cover prior surveillance assignments. In this way, then, law enforcement is able to draw upon

new technology to adjust its resource allocations to enhance crime prevention and detection efforts. *Cf. United States v. Hensley*, 469 U.S. 221, 228 (1985) (recognizing the "general interest present in the context of ongoing or imminent criminal activity is 'that of effective crime prevention and detection'" (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968))).

Decisions on whether to employ new technology to enable the reallocation of resources in ordinary police work implicate a broader question about the effective way to reduce crime—through increased investments in prevention and detection or through increased punishment. On this point, studies show that the effective deterrence and prevention of crime depend more on individuals' expectations about the certainty of being detected and apprehended than on the length of any ultimate term of imprisonment. *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 12-15 (1998) (summarizing studies suggesting that the certainty of sanction, not the severity of punishment, has a greater deterrent effect); *see also* John M. Darley, *On the Unlikely Prospect of Reducing Crime by Increasing the Severity of Prison Sentences*, 13 J. L. & POL'Y 189, 193-95, 202-05 (2005) (summarizing reports suggesting that, while there are no general demonstrations of crime reductions achieved through longer sentences, increased prevention of crime appears possible when individuals assess the risk of detection to be high).

One recent analysis concluded that the substantial crime reductions in the 1990s in New York City resulted in significant part from the addition of 7,000 new NYPD officers focused on high-

crime areas. *See* Franklin L. Zimring, *How New York Beat Crime*, SCIENTIFIC AMERICAN 74-79 (Aug. 2011); *accord* Franklin L. Zimring, THE GREAT AMERICAN CRIME DECLINE 151 (2007) (observing that "there is powerful circumstantial evidence that compound major changes in the quantity of police and the tactics of policing had a major impact" on the reduction of crime in New York City). These analyses support law enforcement decisions to expand police presence and thus overall detection efforts through the use of new technologies like GPS tracking devices.

C. Barring The Warrantless Use Of GPS Surveillance Will Hinder Investigations Generally While Disproportionately Impacting Long-Term Investigations.

Not only does the D.C. Circuit's ruling risk macro setbacks to crime reduction efforts, the Court's aggregation reasoning would adversely alter daily police work. Street surveillance often marks an early step in investigating potential criminal activity. And police at the outset of surveillance often have no way to know or predict whether an individual is engaged in criminal conduct. Time tells the answer. It takes the police observing a totality of circumstances—conduct, movements, relationships, demeanors, and sometimes simply locational information—to reach a probable cause conclusion about criminal activity. These parts, in other words, are what often lead over time to the whole that provides the basis for a probable cause determination. In this way, then, the D.C. Circuit's rule may have the backward effect of preventing a technique undertaken precisely to

determine whether probable cause exists in the first place.

The impact of the D.C. Circuit's aggregation reasoning will be even more pronounced on long-term investigations, where the importance of investigations enabling dot connecting over time is at an apex. Cases are made (or not) as law enforcement assemble the parts into a coherent whole. In this respect, then, the D.C. Circuit's requirement of sending law enforcement agents to courthouses for warrants every time they approach an imprecise aggregation threshold risks the diversion of resources at potentially great opportunity costs. Examples are not hard to envision:

- *Organized Crime Investigation*: Suppose, for instance, that the Chicago Police Department has spent months targeting an organized crime organization led by a reclusive mob boss heavily insulated from detection through a complex web of associates. The police attach a GPS to the car of an individual believed to be a low-level associate, but reach the D.C.'s Circuit's aggregation threshold before compiling enough evidence to obtain a warrant. Investigators now face the difficult decision of allocating otherwise occupied officers to physical surveillance or abandoning surveillance of the associate altogether. Either way, the investigation is affected.
- *Terrorism Investigation*: Assume the FBI learns of a possible terrorist cell in Los Angeles and identifies a taxicab driver as

> an affiliate. Agents then begin warrantless GPS surveillance on the taxi, but along the way misgauge the D.C.'s Circuit's aggregation threshold without realizing it. The investigation continues for months, only then to later see the government lose a motion to suppress important evidence obtained after the breach of the threshold.

The practical difficulties of complying with the D.C. Circuit's ruling may be most consequential and indeed comparatively disproportionate in the conduct of long-term investigations.

III. THE COURT SHOULD HOLD THAT A WARRANT IS NOT NECESSARY TO INSTALL A GPS DEVICE IN A PUBLIC PLACE.

This Court also granted review on the question whether the warrantless installation of the GPS—independent of its subsequent use—violated the Fourth Amendment. On this point, the Court should hold that the installation of a GPS on the exterior of a car parked in a public place does not violate the Fourth Amendment.

The Court's decision in *Karo* provides the proper beginning point. In *Karo*, the Court held that the "installation" of a beeper contained in a can of ether then provided to the defendant constituted neither an impermissible search nor seizure. *Karo*, 468 U.S. at 713. No search occurred, the Court explained, because the installation of the beeper "conveyed no information that Karo wished to keep private" and therefore infringed no privacy interest. *Id.* at 712. So, too, was there no seizure because "it

cannot be said that anyone's possessory interest was interfered with in a meaningful way [through the challenged installation]. At most, there was a technical trespass on the space occupied by the beeper." *Id.*

Earlier the same Term, the Court decided *Oliver v. United States*, 466 U.S. 170 (1984), emphasizing in the context of further defining the open fields doctrine that the Fourth Amendment is not "intended to shelter from government interference or surveillance" activities—including private activities—in such visible locations. *Id.* at 179. "[A]s a practical matter," the Court emphasized, open fields "usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be." *Id.*

Two years later the Court, in deciding *New York v. Class*, 475 U.S. 106 (1986), drew upon *Oliver* to underscore the lessened privacy interests in activity in open spaces. In *Class*, the Court held that the police did not violate the Fourth Amendment by reaching inside a car "driven upon the public roads" to move papers covering the vehicle identification number. *Id.* at 114. In so holding, the Court reminded that "the physical characteristics of an automobile and its use result in a lessened expectation of privacy," *id.* at 112, while also explaining that "[t]he exterior of a car, of course, is thrust into the public eye and thus to examine it does not constitute a 'search,'" *id.* at 114 (citing *Cardwell v. Lewis*, 417 U.S. 583, 588-89 (1974)).

These principles find straightforward application to the facts here. Law enforcement officers installed the GPS on Jones's car and later

replaced the device's battery at times when the Jeep was parked in public parking lots. At no point did the officers enter the car. *See* Brief of the United States at 39, 41. Nor has Jones alleged that he took any action to prevent the public from observing the Jeep's bumper or undercarriage. Also missing is any suggestion that the GPS somehow affected the car's driving qualities, drew power from the car, took up room otherwise available for passengers or packages, altered the car's appearance, or resulted in any action that could be construed as intruding upon Jones's possessory interest in the Jeep. Put differently, this case is not one requiring the Court to address installation of a GPS inside a residential garage or similar location or in some manner triggering a more difficult balancing of interests. Everything here happened in public without in any way infringing upon Jones's use of or activity inside the Jeep.

Accordingly, the Court should hold that the installation of a GPS device on the exterior of a car parked in a public space does not violate the Fourth Amendment.

CONCLUSION

For these reasons, and those articulated in the Solicitor General's brief, the Court should reverse the D.C. Circuit's ruling and hold that neither the warrantless use nor installation of a GPS tracking device violated Antoine Jones's Fourth Amendment rights.

Dated: August 18, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF AMICUS CURIAE[1]

The Constitution Project ("Amicus") is an independent, nonprofit, bipartisan organization that promotes and defends constitutional safeguards. Amicus brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues, frequently appearing as amicus curiae before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of constitutional rights.

In the wake of September 11, 2001, Amicus created the Liberty and Security Committee, a blue-ribbon, bipartisan committee of prominent Americans dedicated to protecting both national security and civil liberties. As part of that mission, the Committee develops policy recommendations on issues, including governmental surveillance, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights. In 2006, the Committee released *Guidelines for Public Video Surveillance: A Guide to Protecting Communities and Preserving Civil Liberties*, analyzing how rapid changes in technology have eroded the distinction between private and public spaces in the context of public video surveillance systems. On September 21, 2011, the Committee released its *Statement on Location Tracking*, in which Committee

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members urged that we must "carry forward Fourth Amendment safeguards into the Digital Age."[2] The Committee concluded that the Fourth Amendment requires law enforcement to obtain a warrant before installing a GPS device on an individual's property, and before employing GPS technology to conduct prolonged tracking of an individual's movements, even if on public streets.

Amicus is dedicated to ensuring that transformative changes in surveillance technology do not undermine the protections of property interests and privacy rights that the Framers enshrined in the Fourth Amendment. Accordingly, Amicus has a substantial interest in the important issues raised in this case.

SUMMARY OF ARGUMENT

GPS technology constitutes an inexpensive and exceedingly powerful government tool that makes possible prolonged and exceptionally detailed surveillance far beyond the capacity of human beings. Installation of a GPS device on a private vehicle requires government agents to tamper with the vehicle, raising constitutional concerns about government interference with the owner's possessory interests in the vehicle. Technological intrusions into public and private spaces can significantly infringe upon a legitimate expectation of privacy. Installation of a GPS device on private prop-

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[2] The report is available at http://www.constitutionproject.org/pdf/locationtrackingreport.pdf. A list of the Committee's members joining the report is provided in the Appendix attached hereto.

erty to conduct protracted, pervasive, and continuous remote surveillance constitutes both a seizure and a search, in violation of the Fourth Amendment.

1. While the Court's Fourth Amendment jurisprudence has shifted from a rigid property-based inquiry to an examination of objective and subjective privacy interests, the Court has never retreated from its holdings that the Fourth Amendment protects possessory property interests even in cases implicating no privacy deprivations. Even de minimis instances of trespass and other physical encroachments can interfere with an owner's right to exclusive use of his property and rise to the level of a constitutional deprivation. Vehicles are "effects" under the meaning of the Fourth Amendment and therefore fall under the sweep of its protections, absent exigent circumstances that do not exist in this case.

Moreover, affixing a GPS device to a vehicle conscripts that private property into the service of the government by improperly converting the private vehicle into a public surveillance tool, amounting to an unconstitutional seizure. Far from the de minimis interference that the government describes, installation of a GPS device on a vehicle effectively commandeers it for prolonged use as a police surveillance tool, infringing upon the owner's possessory property interest.

Thus, when the government's use of GPS monitoring requires installing a device on an individual's vehicle or other property in violation of the right to exclude, this triggers Fourth Amendment protection, necessitating a warrant substantiated by probable cause.

2. Employing GPS technology to conduct continuous and comprehensive monitoring of Jones's vehicle for twenty-eight days without a valid warrant constituted an impermissible search. This Court has never addressed whether prolonged, warrantless GPS surveillance is constitutional, and its quarter-century-old holding in *United States* v. *Knotts*, 460 U.S. 276 (1983), does not control. The government acknowledges that *Knotts* was not intended to apply to future misuses of electronic surveillance, nor does it genuinely dispute that GPS represents a powerful and transformative change in surveillance technology. Instead, the government spends most of its opening brief arguing that prolonged, warrantless GPS monitoring is merely sense-augmenting and conveys the same type of information as beeper technology. Those arguments are mistaken.

The government is wrong in contending that GPS merely assists government agents making observations in public view. Gov't Br. at 22. Technology has conflated private and public spaces, expanding dramatically the scope of private information exposed to public view. While the GPS surveillance at issue here occurred as Jones drove on public streets, Fourth Amendment protections are not geographically restricted. See *Katz* v. *United States*, 389 U.S. 347 (1967). Rather, the reasonableness of privacy expectations hinges on the nature of the government's intrusion.

GPS has made pervasive and continuous location tracking possible in a way that human observation never could. Light years more advanced than the beeper technology that *Knotts* considered in 1983, GPS is re-

mote, automated, and entirely extrasensory. No method of natural human observation or sense-augmented observation even approaches the broad sweep of surveillance information that GPS yields. GPS technology thus does not "assist" human surveillance by any stretch of the definition; to the contrary, it displaces the need for human actors completely. Also unlike the beepers at issue in *Knotts*—which were incapable of data collection or storage—GPS can collect massive quantities of surveillance data and transmit this data to government computers for unlimited storage, processing, and analysis. Aggregated data collected via GPS affords the government access to comprehensive information concerning a person's behavioral patterns, not merely isolated movements. GPS thus enables the government to examine and pry into a subject's "way of life," including constitutionally protected, lawful associations. Such pervasive monitoring of an individual's movements reveals information that most Americans expect to remain private, even if their discrete, individual movements occur in public.

Finally, GPS technology enables the simultaneous surveillance of a nearly infinite number of subjects. Unchecked by judicial oversight, the continued proliferation and development of GPS raises the specter of an Orwellian society in which the government has free reign to subject any citizen to prolonged and limitless monitoring via powerful extrasensory surveillance technology. The government's unsupported assurances notwithstanding, recent examples of government abuse of GPS surveillance have already provoked public outcry and threaten to undermine the Framers' intent of

safeguarding citizens from unreasonable government encroachments.

Requiring a warrant for prolonged GPS monitoring will not undermine the technology's efficacy as a law enforcement tool. GPS data is, by its nature, most valuable over an extended period. The short time required to obtain a warrant is therefore highly unlikely to impede law enforcement or national security objectives. Law enforcement may avail itself of exigent-circumstances exceptions—such as "hot pursuit" doctrine—in appropriate situations.

Accordingly, this Court should affirm the judgment below and establish a bright-line rule that law enforcement obtain a warrant prior to conducting GPS surveillance that exceeds a twenty-four-hour period, a single trip, or mere sense-augmentation. Such a warrant requirement comports with this Court's "frank recognition that the Constitution requires the sacrifice of neither security nor liberty." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973).

ARGUMENT

I. ATTACHING A GPS DEVICE TO A PRIVATE VEHICLE INFRINGES THE OWNER'S PROPERTY INTERESTS AND CONSTITUTES A "SEIZURE" UNDER THE FOURTH AMENDMENT

By physically tampering with Jones's vehicle to install the GPS device and later change its battery, federal agents committed a trespass. This violated his property interests wholly apart from any incursion into privacy interests. The Court should decline the Government's invitation to excuse its intrusion as a "technical trespass." Gov't Br. at 15. The Government violated Jones's possessory interests in the vehicle and his right to exclude not only by physically interfering with his vehicle, but also by covertly using GPS technology to conscript the private vehicle into a government surveillance tool.

A. The Fourth Amendment Continues to Protect Property Interests, in Addition to Privacy Interests

While the Court's Fourth Amendment jurisprudence has evolved over the past century from a strict property-based analysis to a broader privacy inquiry, modern cases "unmistakably hold that the Amendment protects property as well as privacy." *Soldal* v. *Cook County, Ill.*, 506 U.S. 56, 62 (1992).

Early Fourth Amendment cases emphasized property rights, grounded in traditional property concepts such as trespass. See, *e.g.*, *Olmstead* v. *United States*, 277 U.S. 438, 457 (1928) (wiretapping did not violate the

Fourth Amendment simply because "[t]he insertions were made without trespass upon any property of the defendants."). As technology advanced, enabling the government to monitor citizens in entirely new ways, the Court began shifting its analysis from the "technicality of a trespass" to an inquiry into "the reality of an actual intrusion into a constitutionally protected area." *Silverman* v. *United States*, 365 U.S. 505, 512 (1961). In its 1967 decision in *Katz* v. *United States*, the Court retreated from its earlier view that "surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution." 389 U.S. 347, 352-353 (1967). Rather, the Court held that even in the absence of a physical trespass or seizure, invasion of privacy-based interests could implicate the Fourth Amendment. *Id.*

While the Fourth Amendment inquiry is no longer strictly a property-based analysis, the Court has never "abandoned use of property concepts in determining the presence or absence of the privacy interests protected by" the Fourth Amendment. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978). To the contrary, "[o]ne of the main rights attaching to property is the right to exclude others" and "one who owns or lawfully possesses or controls property will, in all likelihood, have a legitimate expectation of privacy by virtue of the right to exclude." *Ibid.* The Fourth Amendment analysis may have "shift[ed] in emphasis from property to privacy," but the Court has given "no suggestion that this shift in emphasis * * * snuffed out the previously recognized protection for property under the Fourth Amendment." *Soldal*, 506 U.S. at 64.

Under the Court's modern analysis, a "seizure" of property within the meaning of the Fourth Amendment occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Karo*, 468 U.S. 705, 712 (1984) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). This is true even if the interference implicates no privacy or liberty interest. *Soldal*, 506 U.S. at 65 ("We thus are unconvinced that any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also implicated."). Accordingly, while the Government trumpets that Jones lacked any expectation of *privacy* in the exterior of his vehicle, that is irrelevant to the property and seizure analyses.

B. The Government's Installation of The GPS Device Trespassed on Jones's Vehicle, Transforming It Into a Government Surveillance Tool

1. Jones had a protected property interest in the vehicle

Vehicles are subject to constitutional protection. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 461 (1971) ("The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."). This Court has recognized that the Fourth Amendment protects both privacy interests in vehicles, see *Arizona* v. *Gant*, 556 U.S. 332, 497 (2009), as well as property interests, *Soldal*, 506 U.S. at 65 (observing that, in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), "both

the plurality and the dissenting Justices considered the defendant's auto deserving of Fourth Amendment protection even though privacy interests were not at stake").

Nobody contests that Jones has a possessory interest in the Jeep Cherokee to which the police affixed the GPS device in this case. Jones therefore enjoys standing to vindicate his property interest in the Jeep, a critical distinction between this case and *Knotts*, in which the respondent lacked standing to challenge the original installation of the beeper. 460 U.S. 276, 280 n.** (1983). Indeed, Justice Brennan observed at the time that *Knotts* would have been a "much more difficult case if respondent had challenged * * * [the beeper's] original installation." *Id.* at 286-288 (Brennan, J., concurring). Similarly, in *Karo*, federal agents installed a beeper in a can of ether in which respondent had no property interest. 468 U.S. at 708.

2. The physical installation of the GPS device amounted to a trespass

Federal agents made unauthorized physical contact with Jones's Jeep at least twice, including affixing the GPS device to the vehicle and later returning to the vehicle to replace the GPS device's battery. These encroachments on the Jeep unquestionably constituted government trespass and a violation of Jones' right to exclude. "[T]he attachment of such a[n electronic surveillance] device, without consent or judicial authorization, is an actual trespass." *United States* v. *Shovea*, 580 F.2d 1382, 1387 (10th Cir. 1978), cert. denied, 440

U.S. 908 (1979)[4]; see also *United States* v. *Holmes*, 521 F.2d 859, 865 (5th Cir. 1975) ("[T]he 'beeper' installation was accomplished by an actual trespass."). While the government appears grudgingly to concede the point, it argues that a "technical trespass on the space occupied by the device" does not rise to the level of a seizure. Gov't Br. at 15-16. The government is wrong in claiming that its trespass here can be excused as merely "technical."

As this Court has recognized, even a seemingly minimal physical incursion into an individual's private property in violation of that individual's right to exclude can have constitutional implications. In the Fifth Amendment takings context, the Court has held that the constitutionality of an unauthorized, permanent occupation of space does not depend on the size or volume of the space occupied. "[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 n.16 (1982). Thus the *Loretto* Court held that a cable company's invocation of statutory authority to install two cable boxes on an owner's roof constituted an unconstitutional taking, despite the small size (approximately 1.5 cubic feet) of the space occupied and despite the owner not discovering the occupation until years after installation. *Id.* at 438.

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[4] In *Shovea*, the Court of Appeals did not reach the question of whether the trespass rose to the level of a Fourth Amendment violation because it found that exigent circumstances justified the seizure. No exigent circumstances were present in this case.

Nor do this Court's Fourth Amendment cases excuse a government interference with property interests as "technical" based on the small size of the space occupied or the limited nature of the encroachment. In *Silverman*, the Court held that installation of a listening device on the defendants' property through a heating duct in a shared wall was an "unauthorized physical encroachment within a constitutionally protected area," even though the device in question penetrated the defendants' property by less than an inch. 365 U.S. at 510. The presence of a "physical penetration into the premises occupied by" defendants, while de minimis, was central to the Court's finding of an unconstitutional property intrusion, in violation of the Fourth Amendment. *Id.* at 509.

Perhaps recognizing that *Silverman* may compel a ruling in Jones's favor, the government relegates discussion of *Silverman* to a footnote, weakly suggesting that *Silverman*'s trespass analysis is no longer applicable in light of *Katz*. Gov't Br. at 46–47 n.6. The government is mistaken. While *Katz* held that a government trespass is not *required* for a Fourth Amendment deprivation, it did not "snuff[] out the previously recognized protection for property under the Fourth Amendment." *Soldal*, 506 U.S. at 64. Post-*Katz*, the Court has repeatedly cited *Silverman* with approval and has recognized the continuing vitality of *Silverman*'s property analysis. See, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001); *Dalia* v. *United States*, 441 U.S. 238, 247 (1979); *United States* v. *White*, 401 U.S. 745, 748 (1971).

In sum, the government's installation of a GPS device on Jones's vehicle without a valid warrant was no less an unconstitutional trespass than was the compelled installation of cable boxes on the roof of an apartment building in *Loretto*, or the installation of a listening device that encroached upon defendants' property by less than one inch in *Silverman*.

3. The GPS device converted Jones's vehicle to a police tool, interfering with his legitimate possessory interests

In *Silverman*, the police installed a "spike mike" that minimally encroached defendants' property, but made contact with a heating duct, "thus converting their entire heating system into a conductor of sound." 365 U.S. at 506-507. Here, similarly, federal agents' attaching a GPS device to the Jeep effectively converted the vehicle to a police surveillance tool, working a meaningful interference with Jones's possessory interest in the Jeep.

While agents' installation of the GPS device and subsequent continuous monitoring was surreptitious and did not deprive Jones of the ability to drive the Jeep, "by using the GPS device on the vehicle to track its movements *the police asserted control over it*, converting the [vehicle] to their own use notwithstanding the defendant's continued possession." *Commonwealth v. Connolly*, 913 N.E.2d 356, 370 (Mass. 2009) (emphasis added).[4]

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[4] No exigent circumstances excused federal agents' conscription of Jones's vehicle as a law-enforcement tool without first ob-

The government's interference with Jones's possessory interests in the vehicle was exacerbated by its extended and indefinite duration. The GPS device occupied space on the Jeep continuously, day after day and week after week, ceasing only when the government elected to remove it. While the government may be correct in asserting that a parking official may mark with chalk the tire of a vehicle parked in a public space, such a physical intrusion is truly ephemeral in nature. Once the chalked vehicle drives away, the chalk streak dissolves, as does the government's interference with the vehicle owner's property interest. The government is not, however, entitled to spray-paint a vehicle or otherwise mark or molest it in a manner that is of continuous or permanent duration.

The government notes *Karo*'s holding that transferring to defendants a government-owned can of ether containing a beeper did not amount to a seizure. Gov't Br. at 43 (citing *Karo*, 468 U.S. at 712). In *Karo*, however, the government did not trespass on defendants' property as it did in *Silverman*, *Loretto*, and here. Agents installed the beeper in the can under authority of court order, and it was the government—and not the defendants—who owned the can at the moment of installation. By contrast, here the government did not own the Jeep, and agents trespassed upon the vehicle

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taining a valid warrant. *United States* v. *Russell*, 80 U.S. 623, 627-28 (1871) (holding that government commandeering of a vehicle is permissible only "cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use").

to install the GPS device. This infringed Jones's possessory interests in the vehicle in a manner that was far more substantial and offensive than the *Karo* defendants' minimal property interests in the can of ether they received from a government informant.

The government also notes the holdings of several circuit courts that installing a GPS device does not amount to a seizure absent a showing that the intrusion causes damage to the affected vehicle, affects its driving qualities, draws from its power, or occupies space that could have been used for packages or passengers. See *United States* v. *Hernandez*, 647 F.3d 216, 220 n.4 (5th Cir. 2011); *United States* v. *Garcia*, 474 F.3d 994, 996 (7th Cir. 2007), cert. denied, 552 U.S. 883 (2007); *United States* v. *McIver*, 186 F.3d 1119, 1133 (9th Cir. 1999), cert. denied, 528 U.S. 1177 (2000). These cases, however, fail to address in their analyses this Court's binding precedents in *Silverman* and *Soldal*. Nor do they acknowledge that the government's attaching a GPS device to a vehicle amounts to a usurpation of control over that vehicle—even if silent and clandestine—that meaningfully interferes with property interests in the vehicle.

The Founders well understood that property rights encompass the right to exclude others from its use, even if this use does not impede one's own enjoyment or cause any damage. Blackstone described the contemporaneous understanding of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right to any other individual in the un-

iverse." 2 William Blackstone, *Commentaries* *2. Indeed, that is still recognized as a fundamental aspect of property: "[o]ne who intentionally enters land in the possession of another without the consent of the possessor or other privilege so to do, is liable for a trespass * * * although his presence on the land causes no harm to the land, its possessor or to any thing or person in whose security the possessor has a legally protected interest." Restatement (Second) of Torts § 163.

Government interference with a private owner's right to exclude can trigger constitutional protection even if the interference appears minimal and does not render the property unusable. See, e.g., *Loretto*, 458 U.S. at 422-424 (illustrating that the cable installation did not preclude residents from enjoying unfettered access to all uses of the property); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979) (holding that even public accommodations can suffer takings absent an ability to exclude whomever an owner wishes). Rather, the encroachment occurs when an individual loses the right to exclude whomever he wishes. See *Skip Kirchdorfer, Inc.* v. *United States*, 6 F.3d 1573, 1582-583 (Fed. Cir. 1993). Thus, even though the GPS device did not hinder Jones' operation of the Jeep, its installation and occupation of space infringed his right to exclude others from use of that vehicle.

For the foregoing reasons, the Court should require law enforcement to obtain a warrant prior to trespassing on private vehicles to install surveillance devices or similar technology to transform vehicles into police surveillance tools.

II. PROLONGED GPS MONITORING VIOLATES AN INDIVIDUAL'S PRIVACY INTERESTS AND CONSTITUTES A "SEARCH" UNDER THE FOURTH AMENDMENT

The government's warrantless conscription of the Jeep into police service as a monitoring tool impermissibly violated not only Jones's property interests, but his legitimate privacy interests as well. Using GPS technology to monitor constantly and comprehensively the Jeep's every movement for a period of twenty-eight days constituted an impermissible search, in violation of the Fourth Amendment.

"It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo* v. *United States*, 533 U.S. 27, 33-34 (2001). Advanced surveillance technology blurs the distinction between private and public spaces and raises "especially sensitive" Fourth Amendment concerns. *United States* v. *Knotts*, 460 U.S. 276, 287-288 (1983) (Stevens, J., concurring). In our increasingly technology-dependent society, preserving constitutional freedoms requires limiting the "power of technology to shrink the realm of guaranteed privacy." *Kyllo*, 533 U.S. at 34. Such an exercise requires limiting the government's warrantless use of technology to commandeer an individual's private vehicle into service as the government's data aggregator.

The government advances a broad argument that individuals enjoy no reasonable expectation of privacy when in public places. Gov't Br. at 17-39. But Fourth

Amendment protections—which extend to "people, not places," *Katz* v. *United States*, 389 U.S. 347, 351 (1967)—cannot be so geographically cabined. Rather, what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Ibid.* In cases of technology-enabled surveillance, the reasonableness of a person's privacy expectations hinges on the nature of the government's intrusion.

In *Knotts*, the Court took up the issue of relatively primitive beeper technology for limited durations, specifically deferring the question of the constitutionality of prolonged, technology-aided surveillance. 460 U.S. at 283-284. The invasive realities of GPS technology now squarely present the Court with the occasion to set forth "clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40. To this end, the Court should establish a bright line rule mandating that law enforcement obtain a warrant prior to conducting prolonged GPS surveillance.[5]

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[5] Amicus defines "prolonged" surveillance as any GPS monitoring that exceeds a twenty-four-hour period or a single trip. Alternatively, the line could be drawn at any surveillance that exceeds mere sense-augmentation. This Court has recognized that it must "articulate more clearly the boundaries of what is permissible under the Fourth Amendment," and, although the Court may "hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty," to enable law enforcement to establish procedures that "fall within constitutional bounds." *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991) (setting forth bright-line rule that defendants are entitled to judicial determination of probable cause within forty-eight hours of arrest).

A. GPS Surveillance Over an Extended Period Exceeds the Capacity of Human Observation and Violates Reasonable Expectations of Privacy

1. The extrasensory nature of GPS technology violates reasonable expectations of privacy

Developed by the U.S. Department of Defense, GPS is a satellite-based navigation system that autonomously and continuously renders precise location information. When equipped with a transmitter or recorder, GPS enables government agents to conduct unlimited, pervasive, and continuous remote extrasensory surveillance. Viewed and analyzed in the aggregate, GPS data reveals otherwise imperceptible patterns of individual and group behavior.

The government suggests that GPS merely assists government agents in "mak[ing] observations in public view." Gov't Br. at 22. The government's characterization is wrong. GPS technology does not "assist" naked-eye surveillance efforts; Rather, it supplants them wholesale. No method of human surveillance comes close to rivaling GPS in the technology's capacity for generating comprehensive, continuous, and accurate information.

This Court has required that surveillance employing extrasensory technology can enhance mere observation to such a degree that it transforms the observation into a search subject to Fourth Amendment requirements. *Kyllo*, for example, held that warrantless surveillance using thermal-imaging technology re-

vealed information that was "otherwise imperceptible" to human observation, 533 U.S. at 38 n.5, and thus constituted a search requiring a warrant. Similarly, in *Dow Chemical Co.* v. *United States*, the Court recognized that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." 476 U.S. 227, 238 (1986); *cf. Walter* v. *United States*, 447 U.S. 649 (1980) (holding that warrantless use of a film projector to screen lawfully obtained evidence violated the Fourth Amendment even though the private search doctrine permitted a visual review of the same materials in plain sight).

While *Kyllo* involved the "sanctity of the home," 533 U.S. at 37, Fourth Amendment protections "do not vanish when the search in question is transferred from the setting of a home." *Katz*, 389 U.S. at 359. *Katz*, for example, recognized that an individual enjoys a reasonable expectation of privacy while in a public telephone booth, despite having knowingly exposed his presence to the public, transmitting his voice over public telephone lines, and unknowingly speaking into a government-installed listening device that did not trespass on private space. *Ibid.* A person's reasonable expectation of privacy extends to vehicles as well: the Court has recognized that a motorist's privacy interest in his vehicle, while less substantial than in his home, "is nevertheless important and deserving of constitutional protection." *Arizona* v. *Gant*, 556 U.S. 332, 497 (2009).

2. Prolonged GPS surveillance reveals not just "a day in the life" but the "way of life" of the subject, violating reasonable expectations of privacy

The government's characterization of GPS technology as merely conveying location information to "anyone who wants to look", (Gov't Br. at 22), woefully understates the power of the technology. In addition to enabling extrasensory monitoring, GPS aggregates data in a manner that the beeper technology addressed in *Knotts* did not: GPS works independently around the clock collecting and transmitting to government computers detailed information for unlimited storage and automated digital analysis.

Government agents "simply sit back and let the data—time, date, speed, direction, duration, and location—amass. • • • The data may be stored infinitely; new information—based on the stored data and a variety of government needs—may be generated at any time and per any governmentally-requested calculus / formula / permutation / coordinates." Lenese Herbert, *Challenging the (Un)Constitutionality of Governmental GPS Surveillance*, 26 J. Crim. Just. 34, 35 (2011). GPS does not merely augment sensory observation, it completely displaces it: not only in terms of pervasiveness, but in the technology's power to facilitate comprehensive pattern and behavioral analysis beyond the capacity of human observation and processing.

The Framers, as Justice Brandeis famously observed, "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). Yet when government agents affix a GPS device to a person's private vehicle, the government transforms the vehicle into a tool for amassing data about that person's religious beliefs, physical and mental health, private habits and encounters, political and professional associations, and sexual orientation, to name but a few examples. This hardly protects monitored citizens in the privacy of their beliefs, thoughts, emotions, or sensations.

Indeed, prolonged GPS surveillance reveals not just a "day in the life" but the "way of life" of the subject. *United States* v. *Maynard*, 615 F.3d 544, 561-562 (D.C. Cir. 2010). That discrete movements may occur publicly does not strip individuals of their expectation of privacy in the *aggregation* of their movements over a protracted time period. Travel to houses of worship, psychiatrist offices, partisan strategy meetings, or trysts are, by necessity, exposed to the public in isolation. Absent continuous GPS monitoring, however, natural limitations on human powers of observation and data compilation and analysis prevent in-depth examination of a person's movements over time. Around-the-clock monitoring treads upon not only Fourth Amendment protections, but upon First Amendment "freedom to associate and privacy in one's associations." See *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). Thus the patterns and sequencings of peoples' movements constitute information that most Americans seek to preserve as—and reasonably expect to remain—

private and away from the prying eye of government. See *Katz*, 389 U.S. at 351.

Despite most motorists' reasonable expectation that government is not employing powerful surveillance technology to monitor and analyze their every movement, the government blithely dismisses this possibility, asserting that the "likelihood" of observation is irrelevant to the constitutional analysis. Gov't Br. at 23-25. This Court, however, has counseled a more common-sense approach to analyzing reasonable expectations. In *Bond* v. *United States*, 529 U.S. 334, 338-339 (2000), the Court held that a Border Patrol agent violated a bus passenger's Fourth Amendment rights by physically manipulating a bag that the passenger had stored in a publicly accessible overhead compartment. Although a bus passenger expects that others may handle his bag, the Court reasoned, the passenger does not expect a government agent to feel his bag in an "exploratory manner."

Bond went on to observe that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." 529 U.S at 337. It surely follows that around-the-clock, technological monitoring and data aggregation is "more intrusive" than necessarily-limited human visual inspection of a vehicle's movements. Most Americans would reasonably not expect the government to conduct GPS monitoring any more than they would expect agents physically to manipulate the outside of bags stored in publicly-accessible spaces.

3. Knotts contemplated an entirely different type of technology and is inapposite here

The government is incorrect in contending that GPS technology "convey[s] the same type of information that the beeper conveyed in *Knotts*." Gov't Br. at 38. GPS technology is distinct from beepers in numerous and significant ways.

First, beepers transmit an insufficient signal to permit remote and autonomous surveillance, requiring continuous human involvement. Accordingly, *Knotts* characterized beeper technology as merely sense-augmenting and *not* extrasensory. *Knotts*, 460 U.S. at 281; see also *id.* at 282 ("Visual surveillance from public places * * * would have sufficed to reveal all facts to the police."); *id.* at 283-84 (observing that the beeper did not exceed the capacity of sensory observation); *id.* at 285 ("[T]he beeper was [not] used in any way to reveal information * * * that would not have been visible to the naked eye"); see also *United States* v. *Karo*, 468 U.S. 705, 714 (1984) (explaining that a Fourth Amendment violation may occur where a beeper provided information unobservable "by the naked eye"). By contrast, GPS technology works independently and autonomously, requiring no human involvement.

Second, beepers function passively, with zero capacity for data collection or storage. Beeper surveillance is thus necessarily limited to a discrete journey. *Knotts*, 460 U.S. at 285. *Knotts* emphasized the "limited use which the government made of the signals from [the] beeper," explaining that nothing "indicate[d] that the beeper signal was received or relied upon after

it had * * * ended its [] journey." *Id.* at 284-285. At most, therefore, the sense-augmentation afforded by beepers reveals "a day in the life" of an individual subject. GPS technology, on the other hand, collects and stores vast amounts of data susceptible to government analysis, and reveals a wealth of private information in its aggregation.

Moreover, the *Knotts* Court specifically disclaimed any intent to sanction "twenty-four hour surveillance of any citizen of this country * * * without judicial knowledge or supervision." 460 U.S. at 284. While permitting the use of lawfully installed beepers, the Court specifically deferred the question of whether the government must obtain warrants to employ technology capable of prolonged surveillance. *Ibid.* (deferring analysis until "such dragnet-type law enforcement practices as respondent envisions should eventually occur"); see also *Karo*, 468 U.S. at 715 (recognizing that different types of information warrant protection from tracking). The advent of GPS technology—light-years more powerful and intrusive than the beeper technology contemplated in *Knotts*—now presents the Court with the opportunity to "determine whether different constitutional principles may be applicable" to advanced surveillance technology affixed to a person's vehicle. 460 U.S. at 284.

B. Absent a Warrant Requirement, Any American Would Be Subject to Possible Prolonged and Unchecked Monitoring Via Ever More Intrusive Technology

The Court has expressed a "strong preference for

warrants" as a "more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984) (quotation omitted); see also *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995). The GPS technology at issue in this case is particularly susceptible to abuse by "well-intentioned but mistakenly over-zealous * * * law enforcement." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971) (quotation omitted). Absent a warrant requirement, rapid advances in GPS and other sophisticated technologies would infringe upon the critical protection for personal privacy that the Fourth Amendment has provided against an all-knowing and all-seeing government.

1. Permitting warrantless GPS surveillance would jeopardize the Fourth Amendment's role as a bulwark against unreasonable government infringement on our privacy

The Framers intended the Fourth Amendment to defend free society from the tyranny of a police state. See, *e.g.*, 2 *Legal Papers of John Adams* 140-143 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965) (summarizing James Otis' condemnation of general writs that were "an instrument of arbitrary power," that transformed officers into "tyrant[s]," "[delegated] vast powers," and failed even to impose the usual safeguard of requiring an officer to file a "return" with the issuing court); 3 *The Debates in the Several States Conventions on the Adoption of the Federal Constitution* 588 (Jonathan Elliott ed. 2d ed. 1838) (quoting John Henry's con-

cern at the Virginia ratification convention of 1788 that, absent constitutional protection, "[e]very thing the most sacred may be searched and ransacked by the strong hand of power"). Inspired by the evils of indiscriminate searches and seizures that "placed 'the liberty of every man in the hands of every petty officer,'" *Payton* v. *New York*, 445 U.S. 573, 583 n.21 (1980) (quoting James Otis), the Fourth Amendment "took its origin in the determination of the framers" to create safeguards against such abuses. *Weeks* v. *United States*, 232 U.S. 383, 390 (1914). Surely the Framers would have recoiled at envisioning the "strong hand of power" wielded by the government's unchecked use of around-the-clock and limitless GPS surveillance of private citizens.

The government claims that "practical considerations" minimize the threat of "widespread, suspicionless GPS monitoring." Gov't Br. at 14. This is hardly reassuring. GPS technology enables continuous, remote, and inexpensive surveillance across public and private areas. The surveillance devices are small, rugged, reliable, and easy to install and operate. At minimal cost, installation of a GPS device and archiving data transmitted from it permits automatic and remote monitoring of a person across a broad spectrum of time, yielding troves of comprehensive, accurate, and otherwise unobtainable information. See Nat'l Coordination Off. for Space-Based Positioning, Navigation & Timing, http://www.gps.gov/support/faq/ (last visited Sept. 10, 2011). GPS satellites can support a nearly infinite number of surveillance devices, thereby enabling cost-effective, networked, mass-monitoring of Americans'

movements and patterns of behavior. Without a requirement of judicial oversight, the only thing preventing the practice of "widespread, suspicionless GPS monitoring" is the government's own uncorroborated assurance of self-restraint.

Furthermore, the Court's ruling in this case will affect future surveillance technologies as well. Whatever Fourth Amendment rule this Court adopts here "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. GPS technology, already powerful and omnipresent, will likely become more prevalent as government monitoring becomes even more inexpensive and efficient. Standardization of GPS in cellular phones enables still greater surveillance precision, because phones—unlike vehicles—remain with their users constantly. Ubiquitous cell phone tracking methods, facial-recognition software, and drone technology further enable comprehensive monitoring. Electronic tagging technology such as Radio Frequency Identification ("RFID") can implant identification information in the human body. And developments in nanotechnology and bioengineering promise to expand radically, both in kind and in capacity, the potential for government surveillance. That this information "radiates" out from the person into the public—as did the sound waves that hit the phone booth in *Katz* or the heat emanating from the home's exterior in *Kyllo*—does not diminish the user's reasonable expectation that no body, including the government, is collecting and aggregating that information to assemble and analyze the most intimate details of our lives.

Justice Bradley admonished: "[I]llegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure * * *. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States*, 116 U.S. 616, 635 (1886). Here, permitting limitless GPS monitoring would force all Americans to assume the risk that their every vehicle movement is subject to government monitoring, recording, aggregation and analysis. Doing so would grant the government carte blanche to monitor citizens' comings and goings, absent any criminal suspicion. "Whether motivated by an honest desire to ferret out criminal conduct or nothing more than sheer curiosity, the government will be entitled to check whether we spend our lunch hour at the gym, at the temple, or at the strip club." See Renée McDonald Hutchins, *Tied Up In Knotts? GPS Technology and the Fourth Amendment*, 55 U.C.L.A. L. Rev. 409, 459 (2007). As technology advances and changes over time, "the changes have made the values served by the Fourth Amendment more, not less, important." *Coolidge*, 403 U.S. at 455.

The government, assuming the role of judge of its own actions, assures the Court that "law enforcement has not abused GPS technology." Gov't Br. at 14. Beyond its self-serving nature, this unsupported assertion rings hollow in light of documented instances of apparent abuse. For example, recently a twenty-year-old Muslim-American college student discovered a GPS device affixed to his vehicle. Forty-eight hours after removing it and requesting help online to identify it,

the FBI arrived at his home, retrieved the device, and indicated that he was under surveillance. "We have all the information we needed," the FBI explained. "You don't need to call your lawyer. Don't worry, you're boring." See Kim Zetter, *Caught Spying on Student, FBI Demands GPS Tracker Back*, Wired, Oct. 7, 2010. To date, the government has not charged the student with any crime. Nobody outside the government knows how much covert government-sponsored warrantless GPS monitoring goes undetected. The 2011 landscape demonstrates the prescience of Justice Brennan's 1977 warning that "accessibility of computerized data vastly increase[s] the potential for abuse." *Whalen* v. *Roe*, 429 U.S. 589, 606-607 (1977) (Brennan, J., concurring).

2. A warrant requirement will not impede the value of GPS surveillance as a law enforcement tool

GPS technology is unquestionably a valuable law-enforcement tool. But adherence to Fourth Amendment protections will not "den[y] law enforcement the support of the usual inferences which reasonable men draw from evidence." *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948). It will merely require "that those inferences be drawn by a neutral and detached magistrate." *Ibid.*

Because GPS data is, by its nature, most valuable over a prolonged period, the time necessary for officers to obtain a warrant will unlikely stymie law enforcement or national security objectives. *Compare Maynard*, 615 F.3d at 558 (involving GPS monitoring for twenty-eight days), *United States* v. *Pineda-Moreno*,

591 F.3d 1212, 1213 (9th Cir. 2010) (same over four months), *United States* v. *Jesus-Nunez*, No. 1:10-cr-00017-01, 2010 WL 2991229, at *1-2 (M.D. Pa. July 27, 2010) (same for eleven months), *and People* v. *Weaver*, 909 N.E.2d 1195, 1195-1196 (N.Y. 2009) (same for sixty-five days), with *Knotts*, 460 U.S. at 279 (involving beeper monitoring for a discrete journey). In cases already before the courts, including the present case, government agents have applied for and received warrants to install and employ GPS devices. See, *e.g.*, *Maynard*, 615 F.3d at 566 (noting that a warrant was issued, but expired); *Commonwealth* v. *Connolly*, 913 N.E.2d 356, 370-371 (Mass. 2009) (finding GPS warrant valid); *State* v. *Jackson*, 76 P.3d 217, 221 (Wash. 2003) (ten-day GPS warrant issued). And the federal judiciary already has standards in place to address GPS warrants. See Fed. R. Crim. P. 41(b)(4).

In the event of exigent circumstances, officers may rely upon existing "well-delineated exceptions" to the warrant requirement. *Katz*, 389 U.S. at 357. Hot pursuit, for example, may excuse a warrantless use of GPS surveillance. See *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 298 (1967). Some police departments have already equipped police cars with air guns that fire GPS "darts" at fleeing suspects' cars to permit real-time, remote surveillance of these cars. See StarChase, http://www.starchase.com (last visited Oct. 2, 2011). The Court has also established exceptions to the warrant requirement for investigating reasonably suspicious behavior and ensuring police safety, see, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968), consent searches, see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218

(1973), searches conducted incident to arrest, see, *e.g.*, *New York* v. *Belton*, 453 U.S. 454 (1981), searches of regulated industries, see, *e.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987), and "special need[s]" searches, see, *e.g.*, *Vernonia Sch. Dist. 47J*, 515 U.S. at 646. Indeed, "[t]he argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement." *Karo*, 468 U.S. at 718.

3. The Court should require law enforcement to obtain a warrant prior to conducting prolonged GPS monitoring

The GPS surveillance in this case occurred continuously, twenty-four hours per day, for twenty-eight consecutive days. The GPS device at issue was calibrated to capture detailed location information every ten seconds, collecting more than 3,000 pages of data that proved instrumental to Jones's conviction. Neither human, nor beeper-augmented surveillance could have yielded such comprehensive, accurate results. Nor could federal agents have amassed this data without using GPS to convert the Jeep into a surveillance tool.

"Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice * * *. The-times-they-are-a-changin' is a feeble excuse for disregard of duty." *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring). To provide both the public and law enforcement officers with much-needed clarity, the Court should draw the line at the prolonged

use of GPS monitoring. "That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40. Accordingly, this Court should affirm the D.C. Circuit and establish a bright-line rule that law enforcement obtain a warrant prior to conducting prolonged GPS surveillance, such as that which exceeds a twenty-four hour period, a single trip, or mere sensory-augmentation.[6] Imposing a warrant requirement under these circumstances "will have the salutary effect of ensuring that use of [new technology] is not abused." *Karo*, 468 U.S. at 717.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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OCTOBER 2011

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[6] See *supra* n.5 (discussing possible lines for delineating "prolonged" surveillance).

APPENDIX

MEMBERS OF THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY COMMITTEE ENDORSING THE STATEMENT ON LOCATION TRACKING[1]

CO-CHAIRS:

David Cole, Professor of Law, Georgetown University Law Center.

David Keene, Former Chairman, American Conservative Union.

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AMICUS CURIAE BRIEF

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Petitioner,

v.

ANTOINE JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The Council on American-Islamic Relations (CAIR) is a national nonprofit civil rights and advocacy group dedicated to protecting the civil rights and liberties of American Muslims. CAIR employs government relations, media relations, educational campaigns, litigation, and grassroots advocacy to protect American Muslims from religious discrimination and infringements of their legal rights. CAIR is concerned particularly by extensive and unjustified intrusion upon the constitutional rights of law-abiding members of the American Muslim community.[1]

This case presents legal issues that directly affect the rights and liberties of American Muslims, as members of the community have been increasingly subject to prolonged warrantless GPS surveillance. CAIR is also litigating a case on behalf of an American Muslim plaintiff, *Afifi v. Holder, et al.*, No. 1:11-cv-00460 (D.D.C. filed Mar. 2, 2011), that presents identical legal issues as those here. The Court's holding in this case is very likely to be dispositive of *Afifi*. *Afifi* has been stayed pending the resolution of

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, CAIR states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than CAIR, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

the instant matter. CAIR supports the position of the Respondent and requests that the Court uphold the D.C. Circuit's holding that prolonged warrantless use of a GPS tracking device violates the Fourth Amendment. CAIR also requests that the Court find that warrantless attachment of the device on a vehicle violates the Fourth Amendment.

BACKGROUND

During a joint narcotics investigation in 2004, the Federal Bureau of Investigation and the Metropolitan Police Department began investigating Respondent Antoine Jones, owner of "Levels" nightclub. Police covertly installed a GPS tracking device on a vehicle registered to Jones's wife, which was operated regularly by Jones. Using the information transmitted by the device, law enforcement monitored Jones 24 hours a day for a four-week period. These surveillance activities led to Jones's indictment on federal narcotics charges. At trial, the District Court denied Jones's motion to suppress evidence obtained by GPS, and a jury convicted Jones. *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010).

The D.C. Circuit reversed Jones's conviction, holding that warrantless, continuous GPS tracking of an individual's location for one month was an unreasonable search in violation of the Fourth Amendment. The tracking violated Jones's reasonable expectations of privacy as "prolonged surveillance of a person's

movements may reveal an intimate picture of his life." *Id.* at 562. The Court also relied on eight state laws proscribing warrantless GPS tracking in various ways as evidence of a "societal understanding" that such tracking violates a reasonable expectation of privacy. *Id.* at 564 (internal quotation omitted). The D.C. Circuit limited its analysis to warrantless GPS tracking and declined to address the constitutionality of the initial installation of the device.

SUMMARY OF ARGUMENT

This Court has commented on the dangers of unchecked government surveillance of political, religious, and ethnic minorities during times of heightened national security concerns. This is a concern rooted in the history of dragnet-type surveillance tactics the government has used against minority populations during wartime. Constant surveillance of minority communities perceived as a security threat persisted during the early 20th century Communism scare, World War II, the Cold War, and the Vietnam War.

The latest version of covert and expansive government surveillance of a minority community is that of the American Muslim community in the aftermath of the September 11 attacks. A wealth of anecdotal evidence shows that innocent Muslims have been under close government watch while both performing mundane everyday tasks and attending religious

gatherings. In the last year, use of warrantless and prolonged GPS tracking of vehicles has arisen as one of the government's many surveillance tactics. CAIR is litigating a case on behalf of a young American Muslim who was subject to this type of tracking because of an internet posting made by one of his friends.

For the reasons set forth in Respondent's brief, warrantless GPS tracking violates the privacy rights of American Muslims. In addition, unchecked GPS surveillance restricts Muslims' First Amendment rights of association, speech, and free exercise of religion. The most significant harms have been a chilling effect on American Muslims' mosque attendance and charitable giving. To mitigate these harms, the Court should hold that prolonged warrantless GPS tracking of a vehicle and warrantless installation of a GPS device on a vehicle both violate the Fourth Amendment.

ARGUMENT

Warrantless Prolonged GPS Surveillance Disproportionately Harms American Muslims and Curtails Their First Amendment Rights.

During the last century, the government's ability to undertake broad surveillance during times of national security concerns have led to dragnets against religious, ethnic, and political minorities. The latest iteration of this trend is an unchecked

surveillance regime focused on American Muslims in the wake of the September 11 attacks. In this context, CAIR has started to see an uptick in prolonged, warrantless GPS surveillance of innocent Muslims. This regime of unchecked surveillance, including GPS tracking, significantly restricts American Muslims' First Amendment association, speech, and free exercise rights.

A. Unchecked and overly intrusive government surveillance of minority communities was pervasive throughout the 20th century.

This Court has articulated an interest in preventing excessive targeted surveillance of disfavored populations. "History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies." *United States v. U.S. District Court*, 407 U.S. 297, 314 (1972).[2] "[U]nchecked surveillance" of a minority group, especially one viewed as threatening or dissident, is a "danger" during times of national security fears. *Id.* at 313-14. "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." *Id.* at 314. And the Court

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[2] "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" *Id.*

warned that the lack of any restriction on the power of the Government to watch its citizens allows the state to "name [its] favorite poison – draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists" as a group to be targeted. *Id.* (quoting floor speech by Senator Philip Hart).

The Court's opinion in *United States v. U.S. District Court* came in the context of limitless government surveillance of minority groups that were deemed a security threat during the Vietnam War. "[D]ragnet-type law enforcement practices"[3] have been imposed on minority communities during every period of heightened domestic security concerns. "Terrorism presents an array of twentieth century exemplars to demonstrate the folly of the FBI's historical penchant for investigating political or other groups . . . in the absence of any specific evidence of illegal conduct." George C. Harris, Book Review, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 CORNELL INT'L L.J. 135, 137-38 (2003).

Some examples of these surveillance campaigns[4] provide bases for comparison with the current use of GPS tracking against American Muslims:

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[3] *United States v. Knotts*, 460 U.S. 276, 284 (1983).

[4] This list is not exhaustive. For a detailed overview of 20th century government surveillance abuses, see generally FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES (1976),

(Continued on following page)

- During the first third of the 20th century, "RedSquads" surveilled individuals based on affiliations with certain civic, religious, or civil rights groups. Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 632-33 (2004).[5]

- After World War II, the FBI began using informants, physical surveillance, and electronic surveillance to watch civil rights groups like the NAACP. CHURCH COMMITTEE REPORT, BOOK III, at 412-69.

- During the Vietnam War, the Government undertook covert surveillance of citizens "on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a foreign hostile power." *Id.*, BOOK II, at 5. Intelligence agents had "collected vast amounts of information about the intimate details of citizens' lives and about their participation in legal and peaceful political activities" through covert

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available at http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm (hereinafter "CHURCH COMMITTEE REPORT"). This report was compiled by the precursor to the U.S. Senate Select Committee on Intelligence in the wake of the Watergate scandal.

[5] The squads would collect minute details about broad networks of associates, and "[i]n many cases, individuals' beliefs and affiliations were assumed solely based on temporary association with others or with an organization that espoused particular beliefs, with no evidence that the individual subject shared those views." *Id.*

FBI operations that were "vastly excessive in breadth." *Id.*, Book II, at 8-13. These tactics, including indiscriminate monitoring of first class mail, interception of cables, warrantless microphone surveillance, and confidential informants, violated persons' "reasonable expectations of privacy." *Id.*

B. Law enforcement has conducted indiscriminate surveillance of innocent American Muslims for the last decade.

The latest iteration of the dragnet-style government scrutiny detailed above is the unchecked surveillance that has been focused on the American Muslim community since September 11, 2001. Law enforcement has appeared to treat religion "as a proxy for involvement in terrorism." Fisher, 46 ARIZ. L. REV. at 659.

It is difficult to quantify the level of surveillance by either the percentage or the total number of the American Muslim population that has been covertly surveilled by law enforcement. The lack of data is attributable in large part to the fact that "most intelligence-gathering and file-keeping is done clandestinely." *Id.* at 635.[6] However, anecdotal evidence confirms that covert surveillance of the community – most of which has no connection to terrorism – has

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[6] Because of secretive record-keeping, it is also difficult to know "to what extent investigations are legitimately confined to cases involving potential criminal activity." *Id.*

been taking place all over the country. *E.g.*, AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 75-78, 97-100 (2009), *available at* http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf (hereinafter "ACLU CHARITY REPORT"); Fisher, 46 ARIZ. L. REV. at 639 n.165; Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1242 (2004).

In particular, widespread and indiscriminate physical surveillance of mosques has been a fact of life for Muslims. *See* ACLU CHARITY REPORT 75-78. Across the country, undercover law enforcement agents have monitored mosques looking for clues about terrorism but have not limited their information-gathering to people of whom they have any individualized suspicion of wrongdoing. The most recent example to surface is based on reports of a vast operation undertaken by the New York Police Department (NYPD) in which undercover officers have surveilled over 250 mosques in and around New York City without any factual predicate. Matt Appuzzo & Adam Goldman, Associated Press, *NYPD eyed 250-plus mosques, student groups*, Sept. 6, 2011, http://www.salon.com/news/feature/2011/09/06/us_nypd_intelligence. NYPD allegedly collects minute details about members of Muslim communities, notwithstanding a lack of any individualized suspicion. Matt Appuzzo, Eileen Sullivan & Adam Goldman, Associated Press, *AP Impact: NYPD ethnic tracking included citizens*,

SEATTLE TIMES (Online), Sept. 22, 2011, http://seattletimes.nwsource.com/html/politics/2016284447_apusnypdintelligence.html (discussing NYPD's "Moroccan Initiative" focused on mapping New York's ethnic Moroccan Muslim community).[7] In addition, NYPD watches Muslim community institutions such as banks, cafes, and shops in order to collect vast stores of information about peoples' daily routines, opinions, and associations. *Id.*[8]

C. Unchecked GPS surveillance against innocent American Muslims is increasing.

In some respects, the unrestricted surveillance of the American Muslim community is comparable to earlier wartime surveillance campaigns: (i) law enforcement undertook all of these campaigns during periods of heightened concerns about national security, (ii) the government deemed the surveilled groups to be direct or indirect threats to security, (iii) surveillance of these groups was on a broad scale, and (iv) law enforcement collected detailed private and mundane information on minority persons without any individualized suspicion of wrongdoing. However, recent technological advances, including the GPS

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[7] "Activities such as haircuts and gym workouts were transformed from mundane daily routines into police data points." *Id.*

[8] An anonymous official explained that "[a] lot of these locations were innocent. . . . They just happened to be in the community." *Id.*

technology in question here, add an additional dimension to today's surveillance of American Muslims. Law enforcement now has the ability to gather and disseminate private information about individuals with an efficiency that has been unknown in the past. *See* Kaitlyn A. Kerrane, Note, *Keeping Up With Officer Jones*, 79 FORDHAM L. REV. 1695, 1700-02 (2011).

The issues in this case have a direct and specific effect on the American Muslim community. In the last year, CAIR has encountered an increasing trend in reports of American Muslims being tracked using a GPS device planted covertly on their vehicles. To the best of CAIR's knowledge, none of these devices were installed pursuant to a warrant, and the Government had little to no individualized suspicion that any of the subjects of surveillance were preparing to commit any crimes. CAIR is litigating one of these cases in the United States District Court for the District of Columbia in *Afifi v. Holder, et al.*, No. 1:11-cv-00460 (D.D.C. filed Mar. 2, 2011).

The factual background of *Afifi*, as gathered mostly from a declassified FBI report on our client, is typical. Afifi is a 20-year-old American Muslim. In October 2010, a mechanic found a GPS device attached to the underside of Afifi's vehicle during a routine oil change. Afifi had not known about the device, and neither he nor the mechanic could identify it. Pictures of the device were posted on Afifi's best friend's weblog in a post titled "Does this mean the FBI is after us?" Mot. to Dismiss & for Summ. J., *Afifi*

v. Holder, et al., 1:11-cv-00460, June 16, 2011, Decl. of Joel D. Dabisch, Ex. 1 (declassified FBI report), at 1 (hereinafter "Afifi FBI Report"). A reader commented publicly on the blog that the picture depicted a GPS tracking device. *Id.* at 2.

Two days after Afifi discovered the device, FBI agents went to Afifi's home to question him and retrieve the GPS device. One agent explained to Afifi that if he refused to return the item, he could be subject to larceny, grand larceny, or federal possession of stolen government property charges. *Id.* Afifi eventually agreed to return the device. Afterwards, he mentioned that the device terrified him initially because he thought it was a bomb, and remarked, "How would you feel if you were twenty and found something like that under your car?" *Id.* at 4. When Afifi said that he had considered selling the device online, the agents told him that he would have been subject to state and federal charges for selling stolen property. *Id.*

After Afifi returned the device, one of the agents explained that they were interested in him because of an "anonymous call" that said he may be a national security concern. *Id.* at 5. However, the FBI's suspicions of Afifi were latent until Afifi's best friend commented publicly on his weblog about the ease with which a person in plainclothes could blow up a shopping mall. *Id.* at 7. His friend's comments, which Afifi did not know about, were the catalyst for the FBI's continuous tracking of Afifi. *Id.* The agents

explained to Afifi that he was "boring," but they revealed intimate knowledge of personal details about Afifi. *Id.*

Afifi and some of our other clients have been pressured by the FBI to become informants after discovery of a GPS tracking device on their vehicles. *See id.* In addition, CAIR is concerned that law enforcement has trespassed on private property in order to plant these devices; at least one of CAIR's clients only parks his vehicle in his home's private driveway.

D. Unrestricted GPS tracking contributes to the curtailment of American Muslims' First Amendment rights.

Covert surveillance of American Muslims, driven by religious profiling, has led to a litany of social harms suffered disproportionately both by individuals within the community and the community as a whole. For example, indiscriminate surveillance has created the inaccurate stigma of Muslims as terrorists. *See* Robert S. Mueller III, *The F.B.I.'s New Mission: Preventing Terrorist Attacks While Protecting Civil Liberties*, 39 STAN. J. INT'L L. 117, 122 (2003) ("[T]he overwhelming majority of Muslims, whether in this country or overseas, are peaceful, law-abiding citizens.").

Many of the social harms endured by Muslims also translate into impingements of their constitutional rights. In the Fourth Amendment context, the clearest harms are violations of privacy rights. *See*

generally Joyce W. Luk, Note, *Identifying Terrorists: Privacy Rights in the United States and United Kingdom*, 25 HASTINGS INT'L & COMP. L. REV. 223 (2002) (discussing infringements on constitutional privacy rights based on increased video and facial recognition surveillance after September 11). But pervasive and unrestricted surveillance of a minority community curtails more than just its members' privacy rights. Government action can also restrict First Amendment speech, press, and association rights. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). The Court has acknowledged that a surveillance program can impermissibly chill First Amendment freedoms, even in the absence of a regulation directly prohibiting such rights. *Laird v. Tatum*, 408 U.S. 1, 12 (1972).[9]

The American Muslim community has suffered an abridgement of all three of these interrelated First Amendment rights[10] because of the "chilling effect" caused by increased and unrestricted government surveillance in the last ten years, including unrestricted GPS tracking. If warrantless prolonged use of GPS

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[9] For standing, a plaintiff would need to demonstrate "specific present objective harm or a threat of specific future harm." *Id.* at 14. For an analysis on the differences between mosque surveillance and the factual situation in *Laird* with respect to standing, see Lininger, 89 IOWA L. REV. at 1242 n.191.

[10] "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable part of the . . . freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

surveillance were to continue, these infringements would be exacerbated.

1. The most significant collateral damage from unrestricted GPS surveillance of American Muslims is the curtailment of First Amendment association rights. Freedom to associate and right to privacy in one's associations have a "vital relationship." *NAACP v. Alabama*, 357 U.S. at 462. "The courts that have been most troubled by the use of warrantless GPS tracking have been concerned that the gathering of detailed data on a person's whereabouts could provide an observer the opportunity to learn about a person's habits and associates." Joshua A. Engel, *Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices*, 41 U. MEM. L. REV. 233, 295 (2010) (citing *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003)); *see also United States v. Maynard*, 615 F.3d 544, 562-63 (D.C. Cir. 2010). Anecdotal evidence verifies that continuous surveillance chills association, "particularly for those who are members of, or associate with members of, religious and political minority groups."[11] Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 745-46 (2008). People are also less likely to speak or associate when

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[11] For Muslims, the chilling effect is exacerbated by fears that one's associations will lead to false application of vague "material support" of a terrorist organization statutes or of placement on a terror watchlist. *Id.* at 745-46.

they know they are being surveilled. *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1130-31 (2002).

Widespread government surveillance has noticeably chilled American Muslims' protected associations following September 11, 2001. Strandburg, 49 B.C. L. REV. at 745; *see also* ACLU CHARITY REPORT 111-15. In particular, anecdotal evidence demonstrates that surveillance of mosque attendance has significantly chilled Muslims' willingness to congregate at their houses of worship. "Muslims fear that if someone praying in the corner is suspected of terrorism, anyone who speaks to or associates with him will likewise become a suspect." Fisher, 46 ARIZ. L. REV. at 647 n.165. Mosques that were vibrant communities before September 11 were boarded up after that date because congregants were afraid of constant government surveillance. *Id.*[12] In San Diego, one member of the community commented that "[San Diego Muslims] are afraid to be in big congregations because they fear Big Brother is watching them. . . . Big Brother is watching, I can tell you that." *Id.* (quoting Kelly Thornton, *Local Muslims Feel Eyes of FBI; Fear of Being Watched, of Talking Freely Is Rampant*, SAN

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[12] A congregant at a mosque explained that "[p]eople are afraid to come to the mosque because they don't know who's going to be waiting for them at the mosque. I mean, you come to pray here. I mean, you don't know if the one praying next to you might be somebody who's counting every breath that you have for some made-up reasons." *Id.* (internal quotation and citation omitted).

DIEGO UNION-TRIB., Sept. 10, 2002, at A1 (internal quotations omitted)).”[13]

The potential for unchecked GPS tracking to contribute to this chilling effect is boundless. As explained by one American Muslim:

> The impact is not only on the individual level, but also on the social level. There are people who stopped coming to the mosque because of fear that the government is tagging the cars of people going to the mosque.

ACLU CHARITY REPORT 112. Muslims could also refrain from visiting other Muslims or banks, barbershops, and groceries catering to the Muslim community. In effect, warrantless GPS tracking allows people to be judged “guilty by association.”[14] As demonstrated by the story of our client in *Afifi*, Muslims are being targeted for unrestricted GPS surveillance based on their friendships with other Muslims who write opinionated blogs. This “guilt by association” method of using GPS technology against Muslims exacerbates the chilling effect of association rights.

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[13] “The Justice Department’s present investigations of mosques involve the worst aspects of both *Laird* and *Presbyterian Church* – overbroad targeting in a highly sensitive religious setting.” Lininger, 89 IOWA L. REV. 1201 at 1242.

[14] Guilt by association is “alien to the traditions of a free society.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982).

2. Unchecked GPS surveillance also infringes specifically on Muslims' related right to free speech. Throughout each widespread surveillance campaign in history, law enforcement monitoring has quelled minority speech. The FBI has spent its resources closely surveilling innocent activity, "resulting in a substantial chilling effect on their targets' First Amendment rights of freedom of association and speech and few, if any, prosecutions of actual criminal activity." Harris, 36 CORNELL INT'L L.J. at 138.

The chilling effects of today's general surveillance campaign on American Muslim speech are well-documented. Specifically, Muslim charitable giving[15] has seen a precipitous decline since September 11. *See* ACLU CHARITY REPORT 89-107. While this decline is attributable in part to non-surveillance law enforcement activity, the knowledge that the government is watching them and can become privy to Muslims' donation activities has contributed significantly to this chill. *Id.* 75-78, 97-100; *see also* Kathryn A. Ruff, Note, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 NYU J. LEGIS. & PUB. POLICY 447, 471-75 (2005). Unrestrained GPS surveillance only

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[15] *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026-27 (7th Cir. 2002) (explaining that charitable donations to Islamic charities implicate First Amendment speech rights).

adds to this climate of fear and therefore contributes to the chilling effect of speech.

3. And unchecked GPS surveillance also contributes to restrictions on American Muslims' rights to freely exercise their religion. This Court has underlined the sanctity of the fundamental right to freely exercise one's religion and the scrutiny due to any impingement of that right. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).[16] "Virtually all commentators have recognized the pernicious effect of a law enforcement presence in a church, synagogue or mosque. Every legal scholar addressing this subject has expressed concern about the 'chilling effect' caused by such infiltration." Lininger, 89 IOWA L. REV. 1201 at 1234; *see also* Fisher, 46 ARIZ. L. REV. at 631-32 (explaining that investigations included surveillance of the religious activities of churches, "leading members to withdraw from attendance.").

As explained above, government surveillance of mosque attendance chills Muslims' attendance of religious services. Lininger, 89 IOWA L. REV. at 1233 & n.152. Muslims fear that conspicuously attending mosques will subject them to government investigation.

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[16] "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*

Id. at 1235. In addition, chilling effects on charitable giving also impinge on Muslims' free exercise rights because charity is a main tenet of the Islamic faith. *See* ACLU CHARITY REPORT at 89-107; Ruff, 9 NYU J. LEGIS. & PUB. POLICY at 483. Unrestricted GPS surveillance, which gives law enforcement information about a subject's mosque attendance, further exacerbates this chilling effect.

4. There is no clear doctrinal method through which First Amendment concerns can be mitigated while performing a Fourth Amendment analysis. Professor Akhil Amar has suggested that the Fourth Amendment reasonableness requirement should incorporate values of "constitutional reasonableness" by accounting for common-sense intuitions about the First Amendment harms inflicted by a given law enforcement action. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 804-05 (1994). What is clear is that unrestricted GPS tracking has First Amendment implications, as demonstrated by the chilling effect of widespread surveillance on American Muslim speech, association, and free exercise rights. These concerns should guide the Court to upholding the D.C. Circuit's holding.

CONCLUSION

Accordingly, for these reasons and the reasons in Respondent's brief, the Court should hold that prolonged and continuous GPS surveillance without a

warrant violates the Fourth Amendment. The Court should also hold that installation of a GPS tracking device on an automobile without a warrant violates the Fourth Amendment.

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTOINE JONES,

Respondent.

On a Writ of Certiorari to
The United States Court of Appeals
For The District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[1] EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and constitutional interests, including *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011); *NASA v. Nelson*, 131 S. Ct. 746 (2011); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Quon v. City of Ontario*, 130 S. Ct. 2619 (2010); *Tolentino v. New York*, 926 N.E.2d 1212 (N.Y. 2010), *cert. granted*, 131 S. Ct. 595, (2010) and *cert. dismissed as improvidently granted*, 131 S. Ct. 1387 (2011); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610

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[1] Letters of Consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amici* lodged with the Court Petitioner's and Respondent's letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Appellate Advocacy Fellow Alan Butler contributed to the preparation of this brief.

(2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *Chicago Tribune v. University of Illinois*, No. 10-0568, 2011 WL 982531 (N.D. Ill. Mar. 7, 2011), *appeal docketed*, No. 11-2066 (7th Cir. Apr. 1, 2011); *US v. Pool*, 621 F.3d 1213 (9th Cir. 2010); *Doe v. Luzerne County*, No. 08-1155, (M.D. Penn. Aug. 31, 2010), *appeal docketed*, No. 10-3921 (3rd Cir. Sept. 19, 2010); *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010); *IMS Health v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) *cert. denied*, 129 S. Ct. 2864 (2009); *National Cable and Telecommunications Association v. Federal Communications Commission*, 555 F.3d 996 (D.C. Cir. 2009); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); *Commonwealth v. Connolly*, 913 N.E.2d 356 (Mass. 2009); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in the impact of new surveillance technologies that have the capacity to enable warrantless, pervasive mass surveillance of the public by law enforcement agents. Such techniques offend the right of individuals to operate vehicles on public roads while maintaining privacy and their right to be free of unreasonable searches. EPIC has routinely urged regulators and courts to take meaningful steps towards protecting the privacy

interests of motorists. *See, e.g.* Comments of the Electronic Privacy Information Center to the National Highway Traffic Safety Administration, August 13, 2004, Docket No. NHTSA-2004-18029, (supporting strong privacy safeguards for automobile Event Data Recorders (EDRs), including a clear consumer right to control the collection and dissemination of their driving data);[2] *Herring v. U.S.*, 129 S. Ct. 695, 708-709 (2009) (advocating for suppression of evidence discovered in search of motorist resulting from erroneous police records); *Commonwealth v. Connolly*, 454 Mass. 808 (2009) (concluding that the "installation and use of [a GPS tracking device] was a seizure requiring a warrant" under the Massachusetts Constitution).

The Circuit Court's determination in the present case applies long-standing Fourth Amendment safeguards to emerging technologies. The Court's requirement that law enforcement obtain a warrant before tracking citizens' every movement is consistent with core constitutional principles. If the Court overturns the decision below, it would severely restrict the privacy interests of drivers by allowing unchecked, continuous, surreptitious tracking and monitoring of individuals operating privately-owned vehicles. The Fourth Amendment prohibits such tracking absent a valid warrant.

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[2] *Available at* http://epic.org/privacy/drivers/edr_comm81304.html.

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SUMMARY OF THE ARGUMENT

GPS tracking systems are a rapidly growing new technology based on data received from the Global Positioning System satellite constellation. The systems provide a wide range of benefits, including navigation, transportation, mapping, scientific research, economic planning, and public safety.

United States law enforcement agencies use GPS tracking devices to monitor the activities of residents. The devices can be installed in vehicles, record data including location and velocity, and can store information indefinitely. In this particular application, GPS tracking systems transmit and store a large amount of detailed, personal information concerning an individual's movements. Typically, police covertly install GPS tracking systems in a suspect's vehicle. However, several public and private entities recently mandated the installation of GPS tracking units in vehicles for non-law enforcement purposes. Government proposals are presently pending that would effectively force the installation of GPS tracking units in every vehicle in America. In addition, smartphones and other popular consumer electronics now include built-in GPS receivers that can be used to track individuals' movements.

In this context, the proliferation of GPS tracking technology creates a large, and largely unregulated, repository containing detailed travel profiles of American citizens. Law enforcement access to such information raises the specter of mass, pervasive surveillance without any predicate act that would

justify this activity. Constitutional protections against unreasonable searches are intended to protect individuals from this precise sort of government intrusion.

ARGUMENT

I. GPS Tracking Systems Use Invasive Techniques to Collect and Store a Large Amount of Detailed, Personal Information About Individuals' Movements.

A. The Global Positioning System is a Satellite-based Service

The Global Positioning System ("GPS") is a satellite-based service that enables individuals to determine their precise location anywhere on Earth. The U.S. government operates GPS, and provides free access to the public. 10 U.S.C. § 2281(b) (2011) (requiring the U.S. Department of Defense to provide GPS "for peaceful civil, commercial, and scientific uses on a continuous worldwide basis free of direct user fees"). Anyone can use an electronic device, commonly called a "GPS receiver," to access GPS signals and determine their precise location, altitude, and speed. ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 846 (2007).

GPS relies on a minimum of 24 satellites configured to provide navigation and timing information worldwide on a constant 24 hour per day basis. Los Angeles Air Force Base, *Global Positioning System Fact Sheet.*[3] The U.S. Department of Defense created the system, launching

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[3]http://web.archive.org/web/20090119020458/http://www.losangeles.af.mil/library/factsheets/factsheet.asp?id=5325.

the first GPS satellite in 1978. Cheryl Pellerin, *United States Updates Global Positioning System Technology: New GPS Satellite Ushers in a Range of Future Improvement*, U.S. Dep't of State, Feb. 3, 2006.[4] The GPS service became fully operational in December 1993. Letter from Les Aspin to Secretary of Transportation Federico Pena, (Dec. 8, 1993).[5] There are currently 31 satellites, including "back-up" satellites, in the GPS constellation. National Geospatial-Intelligence Agency, *Current GPS Satellite Data*.[6] The satellites comprising the GPS network are run by the U.S. Air Force 50th Space Wing's 2nd Space Operations Squadron, located at Schriever Air Force Base in Colorado. Global Positioning System Fact Sheet, *supra* at 6. The satellites transmit data on two low-frequency radio bands, one reserved for military use, and the other assigned for civilian use. Garmin, What is GPS?[7] Civilian GPS data is transmitted on the "L1" frequency, 1575.42 Mhz in the UHF band. *Id.* GPS satellites can provide three-dimensional location data (longitude, latitude and altitude) as well as precise velocity and timing information to an unlimited

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[4] http://web.archive.org/web/20061001222057/http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=February&x=20060203125928lcnirellep0.5061609.

[5] *Available at* http://web.archive.org/web/20031116092811/http://www.navcen.uscg.gov/ftp/gps/ARCHIVES/gpsdoc/IOCLTR.TXT.

[6] http://earth-info.nga.mil/GandG/sathtml/satinfo.html.

[7] http://www8.garmin.com/aboutGPS/.

number of users simultaneously. Global Positioning System Fact Sheet, *supra* 6. GPS signals "are so accurate, time can be figured to within a millionth of a second, velocity within a fraction of a mile per hour and location to within 100 feet." US Airforce, Airforce Link, *Global Positioning System Fact Sheet*.[8] Individuals can access the service by using a "GPS receiver." *See* Garmin, *supra*.

B. GPS Receivers Enable Individuals to Access the GPS Satellite System and Determine Their Location, Velocity, and Altitude

A GPS receiver calculates and typically displays its location, velocity, altitude, and the time by decoding data from the GPS satellite network. *Global Positioning System Fact Sheet, supra* 6. As the receiver moves, it continuously updates its location. GPS receivers are readily available through commercial retailers, and commonly used by the general public to assist in navigation. *Id.* Civilian-grade GPS receivers are small enough to be installed in handheld devices or vehicles. *E.g.* Rakon GPS Solutions, *Fact Sheet*, at 2 (detailing a current 2.0 x 1.6 mm chip for use in "smartphones, PNDs, mobile phones, netbooks, recreational GPS, automotive and wireless applications).[9] They are capable of maintaining a strong signal lock with the GPS

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[8]http://web.archive.org/web/20090311031941/http://www.af.mil/factsheets/factsheet.asp?id=119.

[9]http://www.rakon.com/resources/Documents/Rakon%20GPS%20Fact%20Sheet.pdf.

satellites, thus remaining accurate, even when they are used "under tree canopies or in canyons, on country roads or beneath sky scrapers." GPS for Today, *Small GPS Tracking Chips*, Dec. 21, 2009.[10]

The sale of GPS receivers has grown exponentially since the joint trial of defendants Jones and Maynard ended in 2008. Berg Insight AB, *GPS and Mobile Handsets* (showing an estimated 228 Million GPS-enabled handsets sold in 2008-2009 with predicted sales of over 770 Million units in 2014).[11] Millions of GPS navigation receivers are sold per quarter by the top three manufacturers – Garmin, TomTom and Magellan. Canalys, *US PND Market Doubles in Q2*, Aug. 14, 2008.[12] However these navigation companies are facing increased competition because GPS technology is now integrated into most smartphones and vehicles. Sayantani Ghosh and Roberta Cowan, *GPS Sales Drop as Smartphones, New Vehicles Offer Navigation*, The Globe and Mail, Aug. 08, 2011.[13] Drivers use Smartphones in much the same way as

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[10] http://www.gpsfortoday.com/small-gps-tracking-chips/.

[11] *Available at* http://www.berginsight.com/ReportPDF/ProductSheet/bi-gps4-ps.pdf.

[12] *Available at* http://www.canalys.com/pr/2008/r2008081.htm. *See also* Suzanne Choney, *GPS Manufacturers Tout Software Features*, MSNBC, Sept. 17, 2008, *available at* http://today.msnbc.msn.com/id/26747443/#storyContinued.

[13] *Available at* http://www.theglobeandmail.com/globe-drive/car-life/gizmos/gps-sales-drop-as-smartphones-new-vehicles-offer-navigation/article2123105/.

traditional GPS navigation devices. *Id.* ("PNDs are fast being cannibalized as Google and smartphone makers such as Nokia offer free turn-by-turn navigation."). *See, e.g.* Google, *Google Maps Navigation Features*, (describing in-car features such as "Search by voice" and "Car dock mode").[14] GPS receivers not only display location data derived from the satellite network, but also download and relay user location data to manufacturers and service providers. *E.g.,* Garmin, *Garmin's New 3D Traffic*, (describing the company's "multidimensional feed" of traffic data from "high quality sources" such as "other Garmin Nüvi owners");[15] *TomTom HD Traffic – Highlights*, TomTom (describing how TomTom GPS units transmit "real time flow data provided by vehicles..." to the company).[16] The devices generally do not store data regarding their long-term historical movements. *But see, e.g.,* Nate Anderson, *Senator Questions Apple Over iPhone Tracking*, Ars Technica Apr. 21, 2011 (describing the recent discovery of location tracking data stored by default on every Apple iPhone).[17]

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[14] http://www.google.com/mobile/navigation/.

[15] http://www8.garmin.com/move/guidance.html#TB_inline?height=625&width=900&inlineId=vid1.

[16] http://www.tomtom.com/services/service.php?id=89.

[17] http://arstechnica.com/apple/news/2011/04/senator-questions-apple-in-wake-of-ios-tracking-scandal.ars.

C. Law Enforcement Uses GPS Tracking Systems to Conduct Warrantless Surveillance

Law enforcement agencies nationwide use "GPS tracking systems" to conduct surveillance on individuals. *See* Keith Hodges, *Tracking Bad Guys: Legal Considerations in Using GPS*, Federal Bureau of Investigation Law Enforcement Bulletin, July 2007.[18] Typically, law enforcement agents covertly install GPS units in vehicles used by suspects. (*E.g.*, J.A. 112). GPS tracking systems are comprised of three distinct devices that, when combined, allow for the continuous monitoring of a tracked vehicle from a remote computer. (*E.g.*, J.A. 80-82). Effective installation and use enables law enforcement agents to monitor a suspect's movements. (J.A. 82).

The GPS tracking system's first component is a GPS receiver, described above. (J.A. 79). This device decodes GPS satellite data and calculates the receiver's location and velocity. *Id.* The receiver is connected to the GPS tracking system's second component, a cellular phone or other type of cellular radio transmitter that can transmit the GPS data to law enforcement. (J.A. 80). This second component enables police to access GPS data and monitor the status of the receiver from afar. (J.A. 82). The transmitted GPS data is received and stored on the GPS tracking system's third component, a law enforcement computer. *Id.* These computers use

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[18] *Available at* http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/FBI-LE-Bulletin-GPS-Tracking-Jul2007.pdf/download.

mapping software that can display the location and velocity of the GPS receiver in real time, as well as store historical data concerning the receiver's past movements. (J.A. 81). Like most computer files, this data can be retained indefinitely on the computer's hard drive and freely copied and distributed.

Prior to the deployment of GPS tracking systems, law enforcement agents used visual surveillance to track suspects' vehicles. Police occasionally enhanced surveillance through the use of a "beeper." *E.g. United States v. Karo*, 468 U.S. 705, 710 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). A beeper device transmits a radio signal to a receiving unit that "beeps" more loudly as it is moved closer to the transmitter. *Knotts*, 460 U.S. at 277. After surreptitious installation of a beeper in a suspect's car, agents could use a police car-mounted receiving unit to estimate their distance from the location of the beeper as well as its general direction. *Id.* The beeper thus aided the tracking or "tailing" of a suspect in a vehicle by providing rough information concerning an agent's distance and direction from a suspect vehicle that is nearby, but outside the range of visual surveillance. *Id.* at 278. The signal produced by the beeper was ephemeral, did not contain any data about the suspect's absolute location, and could not be stored or distributed by law enforcement.

The covert installation of GPS tracking devices by law enforcement may soon seem as obsolete as the "beeper" used in Knotts. Law enforcement can now access various repositories of GPS (and other) tracking data stored by telecommunications providers and others. *See, United States v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010)

(Kozinski, J., dissenting) (discussing the ease with which law enforcement can access historical GPS data from telecommunications companies); *ACLU v. US Dept. of Justice*, Nos. 10-5159, 10-5167, 2011 WL 3890837 (D.C. Cir. Sept. 6, 2011) (addressing the Department of Justice's decision to redact and withhold information about cases involving cell phone location data acquired without a warrant).

D. GPS Systems Dramatically Expand the Ability of Law Enforcement to Track Vehicles

GPS tracking systems collect and retain a vast amount of data regarding a suspect's movements, and are substantially more invasive than beeper technology. GPS tracking systems are not merely sophisticated beepers. Beepers augment visual surveillance, helping police to keep track of vehicles that briefly elude their gaze. In contrast, GPS tracking systems are wholesale replacements for physical surveillance; this is true whether or not visual observation is possible from a public roadway. In addition, GPS tracking systems collect and retain far more data than beeper technology. A GPS tracking system ascertains and records an individual's precise location. A beeper only determines an individual's approximate location relative to pursuing officers. A GPS tracking system collects and stores the receiver's precise velocity and altitude. A beeper does not detect velocity or altitude data. All information collected by a GPS tracking system can be stored on law enforcement computers for future use. Beeper data is ephemeral – it is heard

by law enforcement agents in real time, and never stored.

GPS technology goes beyond merely enhancing the capabilities of law enforcement to track a suspect. GPS tracking systems transform the capability of the police and allow an officer to simultaneously monitor the activities and locations of many vehicles from a remote computer, substituting for visual surveillance of a single vehicle. Further, data collected by GPS tracking systems can be stored indefinitely on law enforcement computers, and used to create historical logs of citizens' movements. By accessing stored data, law enforcement officers can effectively extend the duration of the original search. Unlike a beeper, which merely enhances human sensory ability in real time, GPS tracking systems allow officers to comb stored data to conduct new searches using a suspect's historical location data, as well as to aggregate data from a variety of sources, both public and private.

In the law enforcement context, the ability of GPS systems to track and store an individual's every move creates substantial privacy risks – precisely the sort of risks the Fourth Amendment aims to prevent. GPS tracking records can reveal a range of private activities to law enforcement – where and when one works, shops, worships, socializes or volunteers. GPS tracking systems can monitor and retain data on every facet of an individual's existence. Absent constitutional limitations, GPS tracking enables law enforcement officials to record and retain an individual's travel history indefinitely, even in circumstances where there is no predicate activity that would justify surveillance and for purposes unrelated to an ongoing investigation.

The abuse of this technique has been established. Private citizens have misused GPS tracking capabilities to stalk ex-lovers or spouses. *E.g.*, Justin Scheck, *Stalkers Exploit Cellphone GPS*, Wall St. J., Aug. 5, 2010, at A1, A14; ShinyHacks.com, *Guide to GPS Stalking Using iPhone, Blackberry, and Android*, Apr. 15, 2011.[19] Widespread, warrantless use of GPS tracking systems by law enforcement presents opportunities for similar misuse. *See Pineda-Moreno*, 617 F.3d at 1125 (Kozinski, J., dissenting) ("Acting together [cell towers and GPS satellites] alone can provide law enforcement with a swift, efficient, silent, invisible and *cheap* way of tracking the movements of virtually anyone and everyone they choose.") (emphasis in original). This risk is particularly severe if no obligation exists to report publicly on this type of surveillance as there is, for example, with the federal Wiretap Act. *See* 18 U.S.C. § 2519 (2011) ("Reports concerning intercepted, wire, oral, or electronic communications"). Application of the Fourth Amendment's warrant requirement to GPS tracking would ensure independent judicial oversight of GPS tracking systems, generate transparency and accountability, and mitigate the privacy risks inherent to this powerful surveillance technology.

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[19] http://www.shinyhacks.com/2011/04/guide-to-gps-stalking-using-iphone.html.

II. Absent a Warrant Requirement, GPS Tracking Systems in the Law Enforcement Context Threaten to Enable Pervasive Mass Surveillance

Widespread installation of GPS tracking systems increases the potential for pervasive mass surveillance of the American public by law enforcement. In the present case, an FBI-Metropolitan Police Department Safe Streets Task Force installed a GPS tracking device on the defendant Jones' Jeep without a valid warrant. *United States v. Maynard*, 615 F.3d 544, 549, 555 (D.C. Cir. 2010). In this instance, the installation was time-consuming, costly, and presumably fraught with peril, as law enforcement agents sought to install the device without alerting Jones to the surveillance. These factors – time, cost, and risk – imposed practical limitations on law enforcement's ability to conduct GPS-based surveillance on hundreds, thousands, or millions of citizens.

However, these practical limitations are being reduced or eliminated as GPS tracking devices become standardized in smartphones and are installed in most vehicles pursuant to government and private sector mandates. Once GPS tracking systems are installed in most vehicles, covert access to a suspect's vehicle will no longer be a necessary predicate to GPS tracking. *See Pineda-Moreno*, 617 F.3d at 1125 (Kozinski, J., dissenting) (discussing the ease with which law enforcement can access historical GPS data from telecommunications companies). Instead, individuals' travel histories will be broadcast and stored as a matter of course. *Id. See also*, Garmin, *Garmin's New 3D Traffic*,

http://www8.garmin.com/move/guidance.html (describing their "multidimensional feed" of traffic data from "high quality sources" such as "other Garmin Nüvi owners");[20] *TomTom HD Traffic – Highlights*, TomTom (describing TomTom's superior traffic service drawing on data sources such as "real time flow data provided by vehicles..."). [21] Ease of access to ubiquitous GPS tracking information enables pervasive mass surveillance of the American public by law enforcement. *Pineda-Moreno*, 617 F.3d at 1125 (Kozinski, J., dissenting) ("By tracking and decoding the movements of millions of individuals the government can use computers to detect patterns and develop suspicions). Such surveillance is inconsistent with citizens' constitutional right to privacy as well as the Fourth Amendment's protections "against unreasonable searches and seizures." U.S. Const. amend. IV. We must, as Professor Jeffrey Rosen recently noted, "preserve our right to some degree of anonymity in the public." Jeffrey Rosen, *Preserve Our Right to Anonymity*, NY Times – The Opinion Pages (Sept. 12, 2011).[22] Therefore, it is critical that police access to GPS tracking be subject to a warrant requirement.

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[20] http://www8.garmin.com/move/guidance.html#TB_inline?height=625&width=900&inlineId=vid1.

[21] http://www.tomtom.com/services/service.php?id=89.

[22] http://www.nytimes.com/2011/09/13/opinion/protect-our-right-to-anonymity.html?_r=1&ref=opinion.

A. Government-mandated GPS Tracking

The future of routine surveillance of motor vehicles in the United States remains unclear. The federal government is tracking drivers in six states using GPS tracking systems designed to assess a mileage tax as an adjunct or replacement for federal gasoline tax revenue. Mileage-based Road User Charge Study FAQs (describing federal pilot program tracking vehicles in California, Idaho, Iowa, Maryland, North Carolina, and Texas).[23] The program could be expanded nationwide. *Id.* (stating "[t]his system could one day replace the gas tax."). *See* David A. Patten, ***White House Wants to Track and Tax Your Mileage***, NewsMax, May 5, 2011.[24] Such expansion would effectively mandate the installation of GPS tracking devices in every private vehicle in America. Several states, including Massachusetts, are also considering the implementation of mileage tax schemes.[25] Mileage

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[23]http://web.archive.org/web/20090307175147/http://www.roadusserstudy.org/faq.aspx.

[24]*Available at* http://www.newsmax.com/Headline/gas-tax-tracking-obama/2011/05/05/id/395346.

[25] *See, e.g.*, Secretary James Aloisi, Massachusetts Executive Office of Transportation, Exploring VMT, Feb. 24, 2009, http://transportation.blog.state.ma.us/blog/2009/02/exploring-vmt.html (Massachusetts mileage tax proposal); U.S. Dep't of Transportation, *Minnesota: Mileage-Based User Fee Regional Outreach Statewide*, http://ops.fhwa.dot.gov/tolling_pricing/value_pricing/projects/not_involving_tolls/autousecostsvariable/mn_mileagedbasedfee.htm (Minnesota mileage tax proposal); Colorado Dep't. of Transportation, *VMT Fee Option*,

tax regimes typically hinge on mandatory installation of GPS tracking systems in citizens' vehicles. For example, Massachusetts Governor Deval Patrick proposed a "Transportation and Economic Security Plan," which included taxes based on "vehicle miles traveled," calculated through mandatory GPS tracking. Secretary James Aloisi, Massachusetts Executive Office of Transportation, *Exploring VMT*, Feb. 24, 2009 (Massachusetts mileage tax proposal).[26]

Government employers also use GPS tracking systems to monitor their workers. The Massachusetts Highway Department requires independent snowplow contractors to carry GPS tracking units that seek to determine if workers are driving at an optimal speed for laying down road salt. *See* Nannette Green Kaminski and William Tran, *The National Workrights Institute, On Your Tracks: GPS Tracking in the Workplace* at 6.[27] In 2006, IC Corporation, the nation's leading manufacturer of school buses, began installing GPS tracking units in its buses, including buses purchased and use by school districts nationwide. Automotive World, *IC*

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www.chcpf.state.co.us/governor/pdf/blueribbon-transporation/8-2007-Meeting/RevenueOption-VMT-08-07.pdf (Colorado mileage tax proposal).

[26] http://transportation.blog.state.ma.us/blog/2009/02/exploring-vmt.html. *See also*, Glenn Johnson, *Massachusetts May Consider a Mileage Charge*, Associated Press, Feb. 17, 2009, *available at* http://abcnews.go.com/Technology/wireStory?id=6894994.

[27] *Available at* http://workrights.us/wp-content/uploads/2011/02/NWI_GPS_Report.pdf

Corporation to offer GPS tracking in school buses, Mar. 11, 2005.[28] In Wayne County, Michigan, salt trucks and pothole crews are equipped with GPS tracking units that broadcast the location and speed of trucks and snowplows. Kaminski and Tran, *supra* at 15. Oakland, California maintains GPS tracking units on every road crew and each street-sweeping vehicle. Judy Muller, *Worker Whereabouts: California City Monitors Employees Via Satellite Technology*, ABC News, Feb. 21 2004.[29] King County, Washington installed GPS tracking units on vehicles responsible for hauling waste between landfills and transfer stations. Kaminksi and Tran, *supra* at 8. Charleston, South Carolina and Aurora, Colorado use GPS tracking units to monitor city garbage trucks and street sweepers. *Id.* Authorities in Clinton Township, New Jersey surreptitiously placed GPS tracking units on police cruisers. *Id.* at 7-8. Police in Johnstown, New York use GPS tracking systems to keep an eye on the location of patrol cars. Jim McGuire, *GPS Units Keep Tabs on Johnstown Officers' Whereabouts*, Schenectady Daily Gazette, Apr. 4, 2009.[30]

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[28] http://www.automotiveworld.com/news/commercial-vehicles/ic-corporation-to-offer-gps-tracking-in-school-buses. *See also* Adam Geller, *Bosses keep sharp eye on mobile workers via GPS*, Associated Press, Jan. 3, 2005, available at http://www.usatoday.com/tech/news/2005-01-03-gps-supervision_x.htm.

[29] Available at http://abcnews.go.com/WNT/story?id=129219&page=1.

[30] *Available at* http://www.dailygazette.com/news/2009/apr/04/0404_geepeeesses/.

B. Private Sector-mandated GPS Tracking

Private employers have also been aggressive in mandating GPS tracking technologies. The United Parcel Service ("UPS") uses GPS tracking units to monitor all UPS trucks. United Parcel Service, *UPS Drivers Receiving New Wireless Computers*, May 9, 2005.[31] In 2001, Roadway Express, a long-haul trucking company, installed GPS devices on rigs operated by union drivers. Adam Geller, *New Uses of GPS Boost Productivity but Rankle Employees*, Associated Press, Jan. 1, 2005.[32] J.B. Hunt, one of the nation's largest trucking lines, also utilizes GPS tracking systems to monitor trucks. *See* J.B. Hunt-Delivery Services, *Technology*.[33]

GPS devices are widely available and are becoming increasingly inexpensive.[34] Estimates

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[31] *Available at* http://www.pressroom.ups.com/mediakits/pressrelease/0,2300,4560,00.html

[32] Available at http://www.seattlepi.com/business/207150_trackingworkers10.html.

[33] http://www.jbhunt.com/solutions/final_mile/technology/ .

[34] *See, e.g.*, GPS World, Business Outlook—GPS Purchases to Generate $4.1 billion in 2007, May 1, 2007, http://cp.gpsworld.com/gpscp/Business+News+&+Outlook/Business-Outlook-mdash-GPS-Purchases-to-Generate-4/ArticleStandard/Article/detail/421378.; RNCOS, *Declining Prices, Rising Demands Drive Global GPS Technology Market*, Jun 10, 2008, http://www.rncos.com/Press_Releases/Declining-

predict that over 770 million new GPS handsets will be sold worldwide in 2014, an increase from the 150 million new units sold in 2009. *GPS and Mobile Handsets*, Berg Insight AB.[35] Many vehicles purchased for private use are now with GPS technology pre-installed. Some cars are equipped with GPS tracking units.[36] For example, millions of drivers subscribe to General Motors' OnStar service.[37] OnStar GPS devices operate much like the GPS tracking system used by in the present case; OnStar systems use a combination of GPS receivers and cellular technology to transmit location data to an OnStar call center. *Id.* OnStar will soon begin collecting tracking data from owners of pre-equipped cars, even if the car owners do not subscribe to OnStar's service. Bill Ray, *GM OnStar Cars Will Upload All Data Unless Owners Opt Out*, The

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Prices-Rising-Demand-Driving-Global-GPS-Technology-Market.htm.

[35] *Available at* http://www.berginsight.com/ReportPDF/ProductSheet/bi-gps4-ps.pdf.

[36] See, e.g. Ford Motor Company, *Ford Expands Availability of Next-Generation Navigation to More Than a Dozen 2009 Products*, http://www.ford.com/about-ford/news-announcements/press-releases/press-releases-detail/pr-ford-expands-availability-of-28982; OnStar-Equipped Vehicles, http://www.onstar.com/us_english/jsp/equip_vehicles/current_vehicles.jsp (stating "OnStar is available on more than 50 GM vehicles").

[37] OnStar Technology, http://www.onstar.com/us_english/jsp/explore/onstar_basics/technology.jsp.

Register, Sept. 21, 2011.[38] GPS location data is clearly useful to consumers who use navigation devices, and it may prove valuable to third parties or government investigators as well. However, the usefulness of the technology should not undercut the reasonable expectation of consumers to keep their historical movements private and anonymous. *See* Jeffrey Rosen, *Preserve Our Right to Anonymity*, NY Times – The Opinion Pages (Sept. 12, 2011).[39]

Many other GPS devices are receivers that lack a cellular transmitter. However, even these receivers can be easily converted for use as covert GPS tracking systems. Lightning GPS, the largest provider of GPS tracking technology to law enforcement, manufactures a GPS tracking system that is secretly built into a traditional navigation system. Lightning GPS, *Dashboard Navigation System Doubles as Covert GPS Tracker: Lets Boss Sit in Passenger Seat*, Apr. 2, 2009.[40] The tracking system even includes two manuals, one for the driver, which omits mention of the tracking feature, and

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[38] *Available at* http://www.theregister.co.uk/2011/09/21/onstar_ecall/.

[39] http://www.nytimes.com/2011/09/13/opinion/protect-our-right-to-anonymity.html?_r=1&ref=opinion.

[40] http://www.prweb.com/releases/2009/04/prweb2292264.htm. *See also*, Lightning GPS, *Law Enforcement – Suspect Tracking*, http://www.lightninggps.com/law-enforcement/law-enforcement.php ("Our ruggedized equipment can be covertly stashed on any vehicle or evidence for easy tracking on any computer. Then simply apprehend the unsuspecting suspects' in their lair.") .

another for the person monitoring the driver's movements. Geller, *supra* at 19.

Warrantless access to data obtained through these systems could lead to pervasive surveillance of American citizens by law enforcement agents on a mass scale. Imposition of a warrant requirement by law enforcement for GPS tracking would mitigate this threat by requiring independent judicial oversight of GPS tracking.

III. Police Must Obtain a Warrant Prior to Monitoring a GPS Tracking Unit on an Individual's Vehicle

This Court has recognized the substantial privacy risks posed by the use of surveillance technology by law enforcement, observing:

> that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system.

Lopez v. United States, 373 U.S. 427, 441 (1963) (Warren, J. concurring). Furthermore, "[w]hat [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351 (1967) (Harlan, J. concurring). The Fourth Amendment protects "people, not places." *Id.* In *Katz*

v. U.S., the Court embraced the notion that an individual had a reasonable expectation of privacy within the glass walls of a phone booth, holding that "[what] he sought to exclude ... was not the intruding eye - it was the uninvited ear." *Id.* at 352. Likewise, cars traveling on the public roads may not shield occupants from visual observation, but drivers have a reasonable expectation of privacy that their travel activities would not be recorded absent their choice to record such activity or where they are the target of an investigation, based on a legal standard and a predicate act. The complete record of a driver's movements over the course of a month is neither actually nor constructively exposed to the public. *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010) *cert. denied*, 131 S. Ct. 671, 178 L. Ed. 2d 500 (U.S. 2010) and *cert. granted*, 131 S. Ct. 3064 (U.S. 2011). In addition, warrantless GPS tracking would not automatically withstand constitutional scrutiny even if police could deduce the information through visual observation. *Kyllo v. United States*, 533 U.S. 27 (2001), 35 n.2 (stating "the fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.").

This Court has recognized that privacy protections must keep pace with advances in surveillance technology. In *Arizona v. Evans*, Justice O'Connor acknowledged that "the police, of course, are entitled to enjoy the substantial advantages [that] technology confers." *Arizona v. Evans*, 514 U.S. 1 (1995) (O'Connor, J. concurring). However, *Evans* warns, "they may [not] rely on it blindly. With the benefits of more efficient law enforcement

mechanisms comes the burden of corresponding constitutional responsibilities." *Id.*

The Court has not directly addressed whether warrantless GPS tracking constitutes a search under the Fourth Amendment, or whether citizens have a reasonable expectation of privacy concerning GPS tracking. *United States v. Berry*, 300 F. Supp. 2d 366, 368 (D. Md. 2004), (noting that "the Supreme Court's analysis may or may not cover more sophisticated GPS tracking technology, which, unlike a beeper, is a substitute for police surveillance."). However, the Court did rule that visual surveillance aided by beeper technology is not a Fourth Amendment search, and does not require a warrant. *Knotts*, 460 U.S. at 279. In *Knotts*, the Court held that "a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already public." *Id.* at 281.

GPS tracking systems collect and retain vast amounts of data, including precise location, velocity, altitude, and historical information. This information cannot be discerned through mere visual observation, and is therefore not "already public." Even when this information is shared with GPS navigation providers, it is typically kept anonymous. *See, e.g.*, Bill Ray, *GM OnStar Cars Will Upload All Data Unless Owners Opt Out*, The Register, Sept. 21, 2011. The Court in *Knotts* dismissed the defendant's allegation that beepers enable "twenty-four hour surveillance of any citizen of this country ... without judicial knowledge or supervision." *Id.* at 283. The Court observed that, *circa* 1983, "the reality hardly suggests abuse." *Id.* However, the Court in *Knotts* cautioned that the

holding was largely based on the limitations of available beeper technology, and warned, "if such dragnet-type law enforcement practices ... should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284. In *U.S. v. Garcia*, the Seventh Circuit, following *Knotts*, reiterated this warning, stating "new technologies [including GPS tracking] enable, as the old (because of expense) do not, wholesale surveillance." *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007). The court warned

> One can imagine the police affixing GPS tracking devices to thousands of cars at random, recovering the devices, and using digital search techniques to identify suspicious driving patterns. One can even imagine a law requiring all new cars to come equipped with the device so that the government can keep track of all vehicular movement in the United States. It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment -- that it could not be a search because it would merely be an efficient alternative to hiring another 10 million police officers to tail every vehicle on the nation's roads.

Id. Many state courts have followed suit and recognized that warrantless GPS tracking could open the door too mass surveillance of everyday citizens. *See, e.g., Commonwealth v. Connolly*, 454 Mass. 808 (2009) (concluding that the "installation and use of [a

GPS tracking device] was a seizure requiring a warrant" under the Massachusetts Constitution); *State v. Jackson*, 76 P. 3d 217 (Wash. 2003) (holding that a warrant must be obtained prior to GPS monitoring); *see also State v. Campbell*, 759 P.2d 1040 (Or. 1988) (holding that warrantless attachment of radio transmitter to suspects car violated Oregon's constitutional protection against unreasonable searches).

As set forth above, GPS tracking systems enable precisely the sort of "dragnet-type law enforcement practices" and "wholesale surveillance" foreshadowed in *Knotts* and *Garcia*. The use of GPS tracking data impedes an individual's reasonable expectation of privacy protected under the Fourth Amendment of the Constitution.

CONCLUSION

Amici respectfully ask this Court to deny Petitioner's motion and uphold the decision of the District of Columbia Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

ANTOINE JONES, *Respondent*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* FOURTH AMENDMENT HISTORIANS IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

This amicus curiae brief supporting respondent Jones is submitted on behalf of a group of scholars with expertise in the Fourth Amendment and its history.

Professor Fabio Arcila, Jr. of Touro Law Center is interested in civil search jurisprudence and the implications that modern developments, such as the increasing interest in preventative searches for regulatory or national security purposes, have on it. The warrantless GPS tracking at issue in this case, though conducted for criminal law enforcement purposes, falls within this interest because it has significant implications for civil searches.

To date, his scholarship has focused upon an historical analysis of Fourth Amendment search and seizure law, with his most recent projects exploring the concepts of probable cause and suspicion under both the common law and early civil search statutes. This scholarship has been published in the *William & Mary Law Review*, the *Boston College Law Review*, the *University of Pennsylvania Journal of Constitutional Law*, and the *Administrative Law Review*, and has been extensively profiled and discussed in the *Michigan Law Review* and the *Tennessee Law Review*.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than himself and Touro Law Center, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for amicus represents that all parties have consented to the filing of this brief.

Associate Professor Wesley M. Oliver of Widener University Law School is a legal historian specializing in nineteenth and early-twentieth century American criminal procedure. Among his scholarship conducting historical analyses of the Fourth Amendment are publications in the *Rutgers Law Review*, the *Tennessee Law Review*, and forthcoming articles in the *Kentucky Law Journal* and the *Mississippi Law Journal*.

Professor George C. Thomas III is the Rutgers University Board of Governors Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers-Newark Law School. He is a prolific scholar whose expertise includes Fourth Amendment history, a subject about which he has published in the *Michigan Law Review*, the *Virginia Law Review*, the *Notre Dame Law Review*, the *Texas Tech Law Review*, and the *Rutgers Law Record*.

SUMMARY OF ARGUMENT

This amicus brief is filed to present the Court with a historical view of the Fourth Amendment. It emphasizes that, under both the common law and early civil search statutes, the government's search and seizure power was nearly always subject to constrained discretion, and instances of wholly unconstrained discretion involved inapposite regulatory activity rather than the type of criminal law enforcement at issue here. The Government's argument that it enjoys unconstrained discretion to engage in unlimited GPS installation and tracking of vehicle movements in public spaces to enforce the criminal law is in tension with this history.

The principle of constrained discretion is most notable in the common law, which is directly relevant because the common law controlled governmental search and seizure behavior in the criminal context. The common law concerned itself with search and seizure activity principally in the stolen goods context. It required governmental agents to operate under warrants—which constrained discretion—in virtually all instances. Warrantless search and seizure authority was rare, but when it existed the circumstances themselves served to limit governmental discretion. Early civil search statutes evince a similar concern for constraining discretion, as they usually required either a warrant or suspicion to justify the regulatory searches and seizures that they authorized.

With regard to the second question presented, an historical Fourth Amendment analysis indicates that both the common law and early civil search statutes recognized and respected an individual's possessory right to exclude. This is evident in notable British common law trespass trials, in which outrage was expressed at the manner of governmental seizure activity. Additional evidence is also found in early civil search statutes, which established processes that carefully guarded the possessory right to exclude.

ARGUMENT

The Court has repeatedly emphasized that Fourth Amendment history is to be the starting point when search or seizure practices are constitutionally challenged. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295,

299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). To understand how an historical analysis applies to GPS tracking, it is important to distinguish between two jurisprudential areas relevant to Fourth Amendment history: the common law, and early civil search statutes. The common law is particularly important because it regulated criminal law enforcement. Also relevant to an historical analysis are early civil search statutes, particularly because regulatory enforcement officers constituted the only law enforcement group in any way comparable to modern law enforcement officers (though there are significant differences between them, such as with regard to training, supervision, professionalism, and force size). At the same time, it must be kept in mind that civil search statutes are not directly apposite because they addressed regulatory matters rather than the sort of traditional criminal law enforcement interest involved in this case. They are, nonetheless, instructive in that they arguably establish minimum thresholds for governmental search and seizure standards.

A unified theme in both the common law and civil search contexts was that governmental search and seizure power was nearly always significantly constrained, particularly in regard to search discretion, and these constraints were incorporated into the Fourth Amendment. This priority was particularly evident in criminal searches under the common law. Additionally, both the common law and early civil search statutes carefully guarded an individual's possessory right to exclude. Despite this history indicating that unregulated governmental

search and seizure discretion was anathema to the Framers and the public when the Bill of Rights was ratified, the Government claims wholly unconstrained discretion to engage in GPS tracking of vehicles in public spaces and to invade possessory interests through installation of GPS devices onto those vehicles.

I. THE HISTORICAL FOURTH AMENDMENT PRINCIPLE OF CONSTRAINED SEARCH DISCRETION IS VIOLATED BY THE WARRANTLESS USE OF A GPS TRACKING DEVICE ON A PRIVATE VEHICLE TO MONITOR ITS MOVEMENTS IN PUBLIC SPACES

A. The Common Law and Constrained Search Discretion

The common law in the new nation severely curtailed search discretion as compared to search practices that had earlier prevailed in Great Britain and the colonies. These limitations on search discretion are evident in the Fourth Amendment's Warrant Clause, which was crucially important to the Framers. They included the Warrant Clause:

> to specify the limited grounds—probable cause, particularity, and oath or affirmation—upon which warrants can be granted, allowing future generations to weaken these restrictions only through the difficult constitutional amendment process. The Framers had multiple objectives in doing so. First, they constitutionalized the common law ban on general warrants to ensure that only *specific* warrants could issue, thereby ensur-

> ing that the general warrants that had been used to oppressive ends in Great Britain—most infamously in the [seditious libel case against Parliamentarian John Wilkes]—could not be used in the new nation. . . . Second, they sought to avoid any repeat of the colonial practice in which crown authorities had resorted to laxly issued writs of assistance to help justify their customs searches. Being familiar with the abuses that accompanied writs of assistance, the Framers believed that both probable cause and particularity should support any search authorized under legal process. The Framers' key concern behind their desire to ban general warrants and writs of assistance was to limit search discretion, and requiring both probable cause and particularity served that end. Third, the Framers sought to limit access to warrants because they immunized officers from suits challenging the propriety of their searches. The Framers accomplished this goal through the Warrant Clause's three requirements, all of which constitute obstacles that must be overcome before a warrant may issue.

Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1281-86 (2010) (citations omitted). The imperative of constraining discretion was a particularly powerful lesson from the Wilkes controversy, in which Lord Chief Justice Pratt emphasized that:

> defendants claimed a right . . . to force persons' houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where

> no offenders' names are specified in the warrant, and therefore *a discretionary power* given to messengers to search wherever their suspicions may chance to fall. *If such a power is truly invested . . . it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.*

Wilkes v. Wood, 19 How. St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763) (emphasis added).

During the Framers' era, these warrant restrictions were successful in severely curtailing governmental search discretion because warrantless searches were much rarer than today. Under the common law, warrantless searches and seizures were authorized only in extremely limited circumstances where an immediate exigency or safety concerns justified abandoning a warrant, such as during a hue and cry pursuit, to quell a disturbance occurring in a law enforcement officer's presence, or during searches incident to arrest. *See* Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1286. These warrantless searches were limited to instances where the circumstances themselves could serve to delineate the outer discretionary search limits. Because all other common law searches had to be conducted under a warrant, the restrictions the Framers placed in the Warrant Clause for issuance of a search warrant very meaningfully constrained search discretion.

There were no circumstances in which the common law tolerated the government exercising its search power for traditional criminal law enforcement purposes absent any discretionary limits. To this extent, the Government's claim in this

case, that it enjoys complete and full discretion to enforce the criminal law through prolonged GPS tracking in public spaces without any oversight, is in severe tension with Fourth Amendment history.

B. Civil Search Statutes and Constrained Search Discretion

1. A warrant or suspicion requirement usually applied to limit search discretion

By far the most dominant search model under early civil search statutes is found in those concerning customs duties. One such statutory act, the 1789 Collections Act, was among the first pieces of legislative business in the new nation. It authorized warrantless but suspicion-based customs searches of maritime vessels, but required warrants for searches on land, such as of a "dwelling-house, store, building, or other place." Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43. This model became ubiquitous, being repeatedly followed.[2]

In a few instances, early federal legislation allowed warrantless but suspicion-based searches in the nation's interior, though this occurred infrequently and only in special circumstances. In two consecutive months in 1815, Congress authorized customs officials to stop and search for illegal goods, upon suspicion, "any carriage or vehicle . . . and . . .

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[2] *See, e.g.*, Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170; *see also* Act of July 8, 1797, ch. 15, § 3, 1 Stat. 533, 534 (imposing duties on salt and incorporating penalties and forfeiture provisions of Act of August 4, 1790).

any person travelling on foot, or beast of burden." Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232; Act of Feb. 4, 1815, ch. 31, § 2, 3 Stat. 195, 195. It appears to have done so out of a desire to minimize the provisioning of hostiles in connection with the War of 1812,[3] and as extraordinary, time-limited search exceptions.[4] Nearly a decade later, Congress empowered "Indian agents" to conduct warrantless searches of traders "upon suspicion or information that ardent spirits are carried into the Indian countries." Act of May 6, 1822, ch. 58, § 2, 3 Stat. 682, 682.

Given these approaches to civil search power, the discretionary analysis is more nuanced in the context of the nation's early civil search statutes than it is under the common law. Usually, search discretion was limited through either warrant, or at least suspicion, requirements. Generally, suspicion-only searches were limited to maritime vessels, while land-based searches were subject to a warrant requirement. Later, a few instances occurred in which suspicion was deemed to be a sufficient basis for a search on land, including of carriages, vehicles, or beasts of burden.

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[3] For example, the earlier act was entitled "An Act to Prohibit intercourse with the enemy, and for other purposes." Act of Feb. 4, 1815, ch. 31, 3 Stat. at 195.

[4] The earlier act was self-repealing, specifying that it was to continue in force only during the "continuance of the present war between the United States and Great Britain, and no longer." Act of Feb. 4, 1815, ch. 31, § 13, 3 Stat. at 200. The following month's act contained a self-repealing provision set at one year. Act of Mar. 3, 1815, ch. 94, § 8, 3 Stat. at 235. The following year Congress "revived" this act and extended it "until the end of the next session of Congress." Act of April 27, 1816, ch. 110, § 3, 3 Stat. 315, 315.

Notably, even these latter instances severely undermine the Government's argument. Given the strong analogy between a "carriage or vehicle" in the nation's first few decades and today's automobiles, the suspicion requirement that early legislation imposed for these searches calls into doubt the Government's position here, which claims an unlimited, fully discretionary right to engage in suspicionless searches of vehicle movements in public spaces through GPS tracking. Moreover, these early authorizations of suspicion-based "carriage or vehicle" searches were exceptional regulatory responses to unique wartime circumstances, rather than representing the quotidian approach to governmental search power in criminal law enforcement that is at issue in this case.

2. *Maximal discretion was sometimes authorized through suspicionless regulatory ship searches, but is inapposite to the traditional criminal law enforcement involved here*

Though, as explained in the preceding section, civil search statutes usually limited search discretion through either a warrant or suspicion requirement, exceptions existed. Sometimes customs searches of maritime vessels could be suspicionless. *See* Act of Mar. 3, 1815, ch. 94, § 1, 3 Stat. at 231; Act of Feb. 4, 1815, ch. 31, § 1, 3 Stat. at 195; Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85, 592 (1983) (discussing § 31 of the Act of August 4, 1790, the Court wrote "the First Congress

clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment").

These four acts admittedly authorized fully discretionary search power, but they concerned civil regulatory searches and thus do not provide the Government support for its suspicionless GPS tracking for criminal law enforcement purposes.[5] The distinction between regulatory and criminal searches is crucial in Fourth Amendment

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[5] Because the acts were regulatory they primarily authorized civil in rem forfeitures for violators, as well as civil fines. However, as is common with many regulatory regimes, they also provided for some criminal consequences. Inclusion of some criminal consequences does not necessarily transform a regulatory regime into one that is treated primarily as criminal in nature. *See United States v. Ursery*, 518 U.S. 267, 288-92 (1996) (holding that provisions for civil in rem forfeiture did not render proceedings criminal in nature); *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979) (discussing jurisprudence used to distinguish regulatory restraints from criminal punishment). Thus, these four acts were primarily regulatory though they included some criminal sanctions: (1) the 1790 act subjected violators to a maximum of six months imprisonment, Act of Aug. 4, 1790, ch. 35, § 60, 1 Stat. at 174, and subjected any master of a vessel who falsely swore under the act to possible imprisonment of up to 12 months, *id.* § 66, 1 Stat. at 175; (2) the 1793 act subjected any person who knowingly and falsely swore or affirmed under the act to penalties for perjury, Act of Feb. 18, 1793, ch. 8, § 30, 1 Stat. at 316; (3) the February 4, 1815 act made offenses a misdemeanor, and also disallowed unauthorized movement between United States and enemy territory, both subject to imprisonment of up to three years, Act of Feb. 4, 1815, ch. 31, §§ 3, 10, 3 Stat. at 196, 199; and (4) the March 3, 1815 act made it a misdemeanor to refuse to join a posse to aid in the act's enforcement, subject to imprisonment of up to three months, Act of Mar. 3, 1815, ch. 94, § 4, 3 Stat. at 232.

jurisprudence. *See Ferguson v. City of Charleston*, 532 U.S. 67, 71-73, 81-82 (2001) (rejecting argument that public hospital's drug testing of pregnant patients had a civil regulatory purpose and thus was subject to lesser Fourth Amendment protections, instead ruling the searches unconstitutional because they were primarily criminal in nature given that prosecutors and police were integral in designing, implementing, and enforcing the policy). Because early suspicionless ship searches were civil and regulatory, they provide no support to the Government as it engages in criminal law enforcement. Rather, "[t]he Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to . . . a policy" that "was designed to obtain evidence of criminal conduct . . . that would be turned over to the police and that could be admissible in subsequent criminal prosecutions." *Id.* at 86. Thus, the few instances of early suspicionless civil ship searches do not undermine the fundamental point that completely discretionary search authority for criminal law enforcement purposes, similar to the type the Government claims here, conflicts with Fourth Amendment history.

II. THE HISTORICAL FOURTH AMENDMENT SEIZURE PRINCIPLE THAT POSSESSORY INTERESTS ENCOMPASSED THE RIGHT TO EXCLUDE IS VIOLATED BY THE WARRANTLESS ATTACHING OF A GPS TRACKING DEVICE TO A PRIVATE VEHICLE

Even after *Katz v. United States*, 389 U.S. 347 (1967), and its embrace of privacy as an organizing Fourth Amendment principle, property concepts continue to be germane to seizure analyses. *See United States v. Padilla*, 508 U.S. 77, 82 (1993) ("Expectations of privacy *and property interests* govern the analysis of Fourth Amendment search and seizure claims.") (emphasis added); *Soldal v. Cook County*, 506 U.S. 56, 62 (1992) ("our cases unmistakably hold that the [Fourth] Amendment *protects property* as well as privacy") (emphasis added). Building upon a property foundation, this Court defines seizures as instances when the government meaningfully interferes with an individual's possessory interests. *Soldal*, 506 U.S. at 61. The Government claims that it did not meaningfully interfere with Jones's possessory interest in his vehicle by placing a GPS tracking device on it. Pet. Br. 42-46. To the contrary, however, under an historical approach to the Fourth Amendment a seizure did occur because the founding generation recognized the right to exclude not just as a property interest, but as a possessory interest as well.

The venerable British search case *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765)—which was part of the famous litigation resulting from the issuance of general warrants targeted at Parliamentarian John Wilkes—provides a fundamental under-

pinning for the Fourth Amendment. *See, e.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Berger v. New York*, 388 U.S. 41, 49 (1967).[6] *Entick* emphasized the important role of property in search and seizure protections, with Lord Camden declaring that "[t]he great end, for which men entered into society, was to secure their property." 19 How. St. Tr. at 1066.[7] *Entick*'s concern with being "secure" was central to the Framers' views of the Fourth Amendment, as is evident in its textual protection that "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV (emphasis added); *see also* Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* § 3.1.2.2 (2008) (exploring founding generation's conception of word "secure"). Without the right to reasonably exclude, possessory interests safeguarding the right to be secure would be largely illusory.

An historical analysis shows that the Government violated this constitutional seizure protection. At the nation's founding being "secure" included the right to exclude and, crucially, this right extended to possessory interests, both under the common law

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[6] "The Wilkes dispute resulted in important changes to the common law, was celebrated in the Americas, and had a strong influence on our search-and-seizure jurisprudence." Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 3 n.5 (2007) (citations omitted); *see also* Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1283 n.11.

[7] Different reports of this case, though addressing the same themes, do not contain the exact same language. *Cf.* 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817.

and in civil search statutes. The Government infringed on Jones's possessory right to exclude when it lacked a warrant to install the GPS device on his vehicle.

A. The Common Law Recognized a Possessory Right to Exclude

Numerous examples exist in the historical record of common law possessory interests encompassing the right to exclude. A primary example comes from the Wilkes dispute in Great Britain, which so profoundly influenced the Framers.[8] In a challenge to the general warrants that had authorized the searches, "[b]etween 1763 and 1769, Wilkes and about fifty other search targets lodged successful trespass actions, with British courts ruling such general warrants void and juries assessing significant damages." Arcila, *In the Trenches*, 10 U. PA. J. CONST. L. at 14 n.41; *see also* Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1281 n.11 (recounting damages granted in many of these lawsuits). Part of what was objectionable was that officials had engaged in illegal seizures when they violated the possessory right to exclude. In Wilkes's home, officials had "fetched a smith" after Wilkes refused to provide "the keys of his bureau"; after the smith "pickt the lock" the officials "swept away every paper . . . found," all of which they put into a sack. *Wilkes*, 19 How. St. Tr. at 1156, 98 Eng. Rep. at 491; *Addenda to the Cases Concerning Mr. Wilkes*, 19 How. St. Tr. 1382, 1407 (1813). This seizure and violation of Wilkes's possessory right to exclude was so

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[8] *See supra* note 6 for evidence of the influence.

galling that the *Entick* court, in an entirely separate but related proceeding, noted the indignity that "Mr. Wilkes's private pocket-book filled up the mouth of the sack." *Entick*, 19 How. St. Tr. at 1065.[9] Akin to how the Government here commandeered Jones's vehicle for its own purposes by installing a GPS device, part of what made the *Wilkes* seizure objectionable was that the government had "improperly and illegally taken notice and made use of" Wilkes's papers. *Addenda to Wilkes Cases*, 19 How. St. Tr. at 1409. The *Entick* court expressed a similar concern for protecting the possessory right to exclude. *See* 19 How. St. Tr. at 1072 ("If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecutions.").[10]

Through "[t]he right . . . to be secure" in the Fourth Amendment, the Framers sought, among other objectives, to protect the possessory right to exclude that had developed in the common law. The common law concerned itself with seizures primarily in the context of stolen goods. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41-43, 47, 50, 55-81 (1983) (examining British criminal pretrial proceedings, including discussion of government's seizure authority in context of search warrants for stolen goods).[11] The common law relating to

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[9] Different reports of the *Entick* decision do not report this same language. *See* 2 Wils. K.B. 275, 95 Eng. Rep. 807 (C.P. 1765).

[10] Again, different reports of the *Entick* decision do not report this same language. *See id.*

[11] The common law also concerned itself with seizures in the context of arrests. *See* Langbein, *Eighteenth-Century Crim-*

stolen goods operated principally under a specific warrant system. *See* Wesley M. Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 383-93 (2011).[12] Thus, the Warrant Clause's three conditions for issuance of a warrant (probable cause, particularity, and oath or affirmation) operated in part to protect the possessory right to exclude because they constrained seizure discretion. As with warrantless searches (*see supra* Part I(A) at 7), even in the extremely limited instances in which the common law tolerated warrantless seizures—for example, at the end of a hue and cry pursuit, or in conjunction with a search incident to arrest—the circumstances themselves significantly limited seizure discretion and thus also protected the possessory right to exclude. No circumstances existed in which the common law tolerated the government exercising its seizure power for traditional criminal law enforcement purposes, and thus broaching the possessory right to exclude, absent any discretionary limits.

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inal Trial, 50 U. CHI. L. REV. at 55-81 (discussing detainee and arrestee examinations by justices of the peace). Those arrest principles, however, are not applicable here.

[12] Oliver asserts that a "very broad doctrine of search incident to arrest permitted an officer to search the arrestee's entire house for the stolen item." Oliver, *Modern History of Probable Cause*, 78 TENN. L. REV. at 383 n.14; *see also id.* at 389-90. Considerable uncertainty exists, however, as to the breadth of the search incident to arrest doctrine in the home. Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1305 & n.103.

B. Civil Search Statutes Recognized a Possessory Right to Exclude

Early civil search statutes jealously guarded the possessory right to exclude by consistently constraining seizure discretion. This is significant because customs duties provided a significant share of funding for the early federal government, and so the enforcement of these customs duties was a national priority, but one that had to contend with rampant smuggling and customs evasion. Thus, civil search statutes were consistent with the Fourth Amendment guarantee that the people were to "be secure" from unreasonable seizures.

Being regulatory in nature, these search statutes operated under a civil in rem forfeiture model. Balancing the private possessory interests in property with the governmental interest in enforcement, the statutes provided for seizures of nonconforming goods pending forfeiture. These seizures implicated the claimant's possessory interest, but not ownership interest, which would be later adjudged at a forfeiture proceeding that would decide which party—the claimant or the government—had a superior ownership interest. When a claimant prevailed in a forfeiture proceeding, he would be entitled to the return of the seized property, and possibly additional damages, costs, or both. *See, e.g.*, *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9-10 (1817). In this regulatory system, the possessory right to exclude played a crucial role and was protected in numerous ways.

The customs system provides the most prominent example of how our nation's early statutes were protective of possessory rights. These statutes showed sensitivity to the accompanying right to exclude by

requiring some objective justification for intrusions, which operated to constrain governmental discretion. Thus, land-based seizures, in which governmental agents took goods and held them pending forfeiture, often required a warrant.[13] Water-based seizures usually required suspicion or at least some objective indicia of wrongdoing, such as an invoice discrepancy.[14] In other instances, some objective indication of noncompliance with regulatory directives sufficed to justify a seizure.[15] In no circumstances were

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[13] *See* Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. at 677; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. at 170; Act of July 31, 1789, ch. 5, § 24, 1 Stat. at 43; *see also* Act of July 8, 1797, ch. 15, § 3, 1 Stat. at 534 (imposing duties on salt and incorporating penalties and forfeiture provisions of Act of August 4, 1790).

[14] *See* Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. at 677; Act of May 22, 1794, ch. 33, § 2, 1 Stat. 369, 369; Act of Feb. 18, 1793, ch. 8, §§ 18, 27, 1 Stat. 305, 312, 315; Act of Aug. 4, 1790, ch. 35, §§ 46-47, 1 Stat. 145, 169; Act of July 31, 1789, ch. 5, §§ 22-23, 1 Stat. 29, 42-43; *see also* Act of July 8, 1797, ch. 15, § 3, 1 Stat. at 534 (imposing duties on salt and incorporating penalties and forfeiture provisions of Act of August 4, 1790).

[15] *See* Act of Mar. 2, 1799, ch. 22, § 94, 1 Stat. 627, 699 (authorizing seizure of "useful beasts" that were imported to breed without a permit); Act of Mar. 2, 1799, ch. 22, § 82, 1 Stat. 627, 692 (providing for seizure of goods intended for export and thus subject to drawback of duties if instead they were relanded in the United States); Act of Mar. 2, 1799, ch. 22, § 50, 1 Stat. 627, 665 (authorizing seizure of goods improperly landed); Act of Mar. 2, 1799, ch. 22, § 43, 1 Stat. 627, 660 (authorizing seizure of any casks or other containers carrying spirits, wines, or teas that lacked required markings or certificates); Act of Mar. 3, 1795, ch. 43, § 12, 1 Stat. 426, 429 (providing for seizure of snuff that was exported and thus subject to drawback of duties if it was instead relanded in the United States); Act of June 5, 1794, ch. 51, § 10, 1 Stat. 384, 386 (providing that snuff and refined sugar was subject to seizure when applicable duties not paid); Act of Mar. 1, 1793, ch. 19, § 3, 1 Stat. 329, 329

governmental agents allowed to enforce customs duties by intruding upon possessory interests merely upon their own wholly unconstrained discretion.

Another important search and seizure paradigm evident in the early civil search statutes originated in Alexander Hamilton's 1791 Excise Act. "This statutory enactment sought to raise internal revenue by imposing excise taxes upon distillers." Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1305 (citation omitted). To enforce the taxes, it required covered distillers to register with local authorities. Act of Mar. 3, 1791, ch. 15, § 25, 1 Stat. 199, 205. The Act also infringed upon such registered distillers' possessory right to exclude by requiring them to "write or paint . . . upon some conspicuous part outside and in front of each house or other building or place made use of . . . and upon the door or usual entrance of each vault, cellar or apartment . . . in which any of the said liquors shall be at any time . . . distilled, deposited or kept . . . the words 'Distiller of Spirits.' " *Id.* The possessory right to exclude was so highly valued that even this painting requirement was protested, with several southwestern Pennsylvania counties declaring in a resolution that "[i]t is insulting to the feelings of the people to have their . . . houses painted . . . ."[16] *Resolves of Southwestern Pennsylvania Delegates of Sept. 7, 1791 Re-*

Stat. 329, 329 (providing that every unlicensed person attempting to trade with Indian tribes, or found in Indian country with merchandise customarily traded with Indians, shall forfeit all merchandise).

[16] These same counties were the site of national insurrection a few years later during the Whiskey Rebellion, which President Washington quelled only after marching in with over ten thousand troops.

garding Hamilton's 1791 Excise Act, INDEP. GAZETTEER, Sept. 24, 1791, at 3.

The possessory right to exclude was also promoted through immunity doctrine, which gave revenue officers a strong incentive to respect the right. Customs officers could obtain immunity from both damages and costs in a subsequent lawsuit challenging a seizure if the court made a certification that "reasonable cause" had existed for the seizure. Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695; Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. 145, 176; Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47. Similarly, under Hamilton's 1791 Excise Act, each excise officer was entitled to "a verdict . . . in his favor" if he succeeded in "justify[ing] himself by making it appear that there was probable cause for making the said seizure." Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. 199, 208. Thus, these revenue officers were given a strong incentive to intrude onto the possessory right to exclude only in justifiable circumstances, thereby providing an incentive for them to exercise constrained seizure discretion.[17]

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[17] It is true that the possessory right to exclude could be infringed for regulatory purposes, such as by requiring that casks and other containers be marked. Act of Mar. 2, 1799, ch. 22, § 39, 1 Stat. 627, 659; Act of Mar. 3, 1791, ch. 15, §§ 12, 19, 27, 1 Stat. 199, 202-03, 206. However, this regulatory intrusion provides no support for similar intrusive authority in the criminal realm, which was governed by the common law, which in turn was more protective of the possessory right to exclude, as described above in Part II(A).

CONCLUSION

In light of the pervasiveness of constrained search and seizure discretion at the time of the nation's founding, and the protections that existed for the possessory right to exclude, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 10-1259

IN THE
Supreme Court of the United States

UNITED STATES, *Petitioner*,
v.
ANTOINE JONES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, U.S. JUSTICE FOUNDATION, INSTITUTE ON THE CONSTITUTION, CENTER FOR MEDIA AND DEMOCRACY, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., DOWNSIZEDC.ORG, DOWNSIZE DC FOUNDATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, DECLARATION ALLIANCE, RESTORING LIBERTY ACTION COMMITTEE, THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, POLICY ANALYSIS CENTER, CONSTITUTION PARTY NATIONAL COMMITTEE, AND LIBERTARIAN NATIONAL COMMITTEE, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Institute on the Constitution, Center for Media and Democracy, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., DownsizeDC.org, Downsize DC Foundation, Conservative Legal Defense and Education Fund, Declaration Alliance, Restoring Liberty Action Committee, The Lincoln Institute for Research and Education, and Policy Analysis Center are an ideologically diverse group of educational organizations interested in the proper interpretation of the U.S. Constitution.

Amici Constitution Party National Committee and Libertarian National Committee, Inc. are national political parties.

Most of these *amici* have filed numerous *amicus curiae* briefs in prior litigation, including in cases before this Court.

Eleven of these sixteen *amici* filed the only *amicus curiae* brief at the Petition stage in the instant case, at that time filing in support of neither party. In this brief, *amici* file in support of Respondent Antoine Jones.

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[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Government does not seek a resolution of this case tailored to its facts. Rather, it strives for total victory — a judicial declaration that the Fourth Amendment does not ever apply to Global Positioning System ("GPS") monitoring, without regard for the facts that the Government committed an illegal trespass to attach the GPS device onto private property, and then indiscriminately monitored the movement of the Jones vehicle, no matter the identity of the driver, the destination of the vehicle, or the length of time.

The Government's extreme view that the Fourth Amendment is completely irrelevant is made possible only by this Court's mistaken jurisprudence that the Fourth Amendment only applies to situations wherein persons have a "reasonable expectation of privacy." This 44-year old doctrine — grafted onto the Fourth Amendment by a judicial rejection of a time-honored rule that protected the people from a "mere evidentiary" search — has proved, as its critics on the court predicted, unfit to secure the liberties of the people.

As the Government has taken advantage of new technologies enabling its agents to penetrate ever more deeply into the private lives of citizens, "society's" expectations of privacy have correspondingly shrunk. Had previous Courts adhered to the original text of the Fourth Amendment, rather than substituting their own language, the right of the people to be "secure in their persons, houses, papers, and effects" would have

preserved their privacy by a permanent wall of the inalienable right of private property.

As this Court held in the seminal case of Boyd v. United States, 116 U.S. 746 (1886) the first freedom of the Fourth Amendment protects the people from any search for or seizure of any private property to which Government could not affirmatively demonstrate that it had a superior right. Thus, even if the Government could meet the warrant, probable cause, and particularity requirements of the Amendment, it could not search for, or seize, property, unless that property was shown to be the fruit of a crime, an instrumentality of a crime, or contraband.

Had this ban on searching for and seizing "mere evidence" held, wiretapping and other forms of surreptitious eavesdropping by sophisticated technological means would have been prohibited by the Fourth Amendment, the foremost purpose of which is to protect the inherent property right that each individual human being has in his own person — including his communications and his movements.

As applied here, the property-based principles of the original Fourth Amendment protects against both the installation and the use of the GPS tracking device. By attaching the device to the Jones vehicle without the owner's knowledge or consent, the Government unlawfully trespassed on Mr. Jones' indefeasible right of private property. And, by monitoring the movement of the Jones vehicle, the Government indiscriminately seized "mere evidence." Not only did the Government's action violate these inherent, God-given unalienable

rights, but the indiscriminate search and seizure of the movement of the vehicle regardless of the identity of the driver or the destination of the vehicle violated the Fourth Amendment ban on general warrants.

ARGUMENT

I. THE GOVERNMENT'S EXTREME POSITION THAT THE FOURTH AMENDMENT DOES NOT EVER APPLY TO GPS SURVEILLANCE ON PUBLIC ROADWAYS IS INSUPPORTABLE.

The Government's petition for certiorari asked the Court to resolve a single issue: "Whether the warrantless **use** of a tracking device on [Respondent's] vehicle to monitor its movement on public streets violated the Fourth Amendment." (Emphasis added.) The Government declined to seek review of the **installation** of the device on Respondent's car, which had been described by Judge Kavanaugh in his dissent from the denial of rehearing *en banc* as Respondent's "property-based *Fourth Amendment* argument concerning the installation" of the GPS device. United States v. Jones, 625 F.3d 766, 770 (D.C. Cir. 2010) (italics original). In granting certiorari, however, this Court placed the property issue front and center by directing the parties also to brief and argue that very issue: "Whether the government violated respondent's Fourth Amendment rights by **installing** the GPS

tracking device on his vehicle without a valid warrent [sic] and without his consent."[2] (Emphasis added.)

In response to this invitation, Respondent Jones traced the property roots of both the Fourth Amendment's search (Resp. Br. pp. 16-23) and seizure doctrines (Resp. Br. pp. 46-52). Beginning with Entick v. Carrington ("The great end, for which men entered into society, was to secure their property") and continuing through Soldal v. Cook Cty., Ill., 506 U.S. 56, 62 (1992) ("[T]he Amendment protects property as well as privacy"), Respondent explained the importance of possessory, not just privacy, interests. *See, e.g.*, Resp. Br. pp. 46-47.

In contrast, the Government mentioned the property issue only briefly, asserting that there was no meaningful interference with Respondent's possessory interests in his car — that the attachment of a GPS device is, at most, a "technical trespass." Pet. Br. pp. 42-45. The Government devotes almost all of its brief to advancing its theory that the Fourth Amendment does not apply at all (Pet. Br. pp. 17-46), and only in the last few pages arguing, in the alternative, that the instant search and/or seizure was "reasonable" (*id.*, pp. 47-51).

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[2] This is not the first time that a court has been required to raise an issue involving the legality of a search not raised by the parties. In Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (KB 1765), the Lord Chief Justice addressed a matter involving the government's authority for the search which he described as having "slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument."

Having brushed aside the property issue, the Government's principal argument is that surreptitious use of GPS tracking devices on private vehicles, while traveling on public roads,[3] constitutes neither a search nor a seizure, and, therefore, that law enforcement is not constrained in any way by the Fourth Amendment in either the installation or use of GPS tracking equipment on private automobiles. Pet Br. pp. 17-42. The Government's brief contains no textual analysis of the Fourth Amendment or any discussion of its historical context. Instead, the Amendment's text appears only as a ritual recitation of the "Constitutional Provision Involved." Pet. Br. p. 2.

Indeed, the Government impliedly disavows that its theory is either historically or textually based, arguing solely that: "**[u]nder current constitutional principles**, the government's investigation in this case did not amount to a search." *Id.*, p. 35 (emphasis added). Under this reading of Fourth Amendment jurisprudence, there would be no need for law enforcement to establish probable cause, or obtain a judicially issued warrant, or even have reasonable suspicion prior to installing a GPS tracking device on any person's automobile — or his clothes, notebook computer, iPad, telephone, or briefcase. Further, if the Fourth Amendment were deemed wholly inapplicable,

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[3] The Government appears not to contest the district court's exclusion of GPS data relating to the Jones vehicle while garaged at his residence, apparently conceding that to be a Fourth Amendment violation, but apparently not having any problem with continuing such violations in the future. Pet. Br. p. 5. *See also* Resp. Br. pp. 4-5.

then, logically, there could be no "unreasonable" use of GPS tracking equipment, although the Government includes a passing reference to the supposed lack of demonstrated "abuse" of this asserted power to track Americans round the clock. Pet. Br. pp. 14, 35. In sum, the Government swings for the fences, seeking the broadest possible victory, disclaiming any constitutional constraint on its dream of establishing a surveillance society limited, if at all, only by "the legislative process." Pet. Br. p. 35.

In sum, the Government's theory of Fourth Amendment jurisprudence would drive the final nail in the coffin of a once robust constitutional "right of the people to be secure in their persons, houses, papers, and effects." If this theory were to prevail, it would be in no small part due to a switch from the original **"property" principles** embedded in the Fourth Amendment's protections to a judicially devised **"privacy" rationale** grafted into the Amendment. Taking full advantage of this Court's Fourth Amendment standard of a "reasonable expectation of privacy" (Katz v. U.S., 389 U.S. 347, 360 (1967)), the Government has shown that the bar on "unreasonable searches and seizures" has already deteriorated into a weak and anemic parchment barrier, unfit to protect the people against the demands of law enforcement for increasingly intrusive forms of surveillance.

According to the historical and textual principles of private property that undergird the Fourth Amendment, however, Government installation of GPS devices on private vehicles to track the movement of such vehicles in any place, including a public roadway,

is absolutely prohibited. Such monitoring of the movement of such vehicles is an "unreasonable search[] and seizure[]" because it "violates" the rights of the people to be secure in their "persons" and "effects." Such installed GPS tracking devices are "unreasonable" *per se*, an impermissible means of investigation or surveillance, unavailable to the Government even if the Government obtains a warrant upon probable cause supported by oath or affirmation, and describing with particularity the persons or things to be seized. While it may not be possible for any one judicial decision to reconstruct completely the Court's Fourth Amendment jurisprudence, this case presents the opportunity for the Court to return to the text of the Amendment, to acknowledge its property basis, and to review the decision of the U.S. Court of Appeals for the D.C. Circuit within that framework.

II. THE "EXPECTATION OF PRIVACY" TEST FOR SEARCHES AND SEIZURES AROSE WITHOUT SUPPORT IN THE TEXT OR HISTORICAL CONTEXT OF THE FOURTH AMENDMENT, AND HAS PROVEN WHOLLY INADEQUATE TO PROTECT THE AMERICAN PEOPLE FROM THEIR GOVERNMENT.

Only 44 years ago, in Warden v. Hayden, 387 U.S. 294 (1967), this Court formally abandoned the "mere evidence rule," together with its well-established Fourth Amendment jurisprudence based upon "property rights," in favor of one rooted in an emerging right of "privacy." The Court's motivation for the

change was not some new insight or scholarship as to the original meaning of the Fourth Amendment in 1791. Indeed it could not have been, as the seed of what has become the "right of privacy" was contained in a law review article by Samuel D. Warren and Louis D. Brandeis published nearly a century after its ratification. In "The Right to Privacy," 4 HARV. L. REV. 193 (1890), Warren and Brandeis proposed the "next step" in the development of common law was to **create** a cause of action for violation of a person's "right to privacy." The right of privacy was discussed not as being then in existence (in the common law or as a right contemplated by the authors of the Constitution) but as one that should be fashioned for the future.

In Hayden, Justice William J. Brennan — writing for a bare majority of five justices — jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable" because of supposed dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts." Hayden, 387 U.S. at 304. Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits [of crime] and contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the Government to demonstrate that it has a "superior property interest"[4] in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth

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[4] *Id.* at 303-04.

Amendment from "irrational,"[5] "discredited,"[6] and "confus[ing]"[7] decisions of the past, and thereby would provide for a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property." *Id.* at 304.[8]

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Earl Warren) stated that he "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the search-warrant requirement,"[9] Justice Fortas sought to avoid what he called "an **enormous and dangerous hole** in the Fourth Amendment"[10].

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[5] *Id.* at 302.

[6] *Id.* at 306.

[7] *Id.* at 309.

[8] In abandoning the "mere evidence" rule, the Hayden Court also did away with the linkage between the Fourth Amendment and the prohibition against compelled self-incrimination of the Fifth. In Boyd, the Court viewed the two amendments as linked: "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself...." Boyd, 116 U.S. at 633 (emphasis added).

[9] *Id.* at 312 (Fortas, J., concurring).

[10] *Id.* (Fortas, J., concurring) (emphasis added).

> [O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "**writs of assistance**," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. **I fear that in gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as **essential** to enforce the Fourth Amendment's prohibition against general searches, the Court today **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* at 312 (Fortas, J., concurring) (emphasis added).]

Justice Brennan frankly admitted that, by erasing the property protection from the Fourth Amendment, his newly-minted privacy-based Hayden rule **"does enlarge the area of permissible searches."** Hayden, 387 U.S. at 309 (emphasis added). He apparently assumed that the newly-permitted intrusions for "mere evidence" would be checked by the warrant, probable cause, and magistrate requirements of the Amendment's second phrase. *See id.* However, as the instant case dramatically illustrates, Justice Brennan's Fourth Amendment revolution has actually undermined the warrant, probable cause, and magistrate requirements of the Amendment.

Having abandoned the property-based "mere evidence" rule in favor of the "reasonable expectation of privacy" guideline, the Hayden Court opened the

door not only to a search warrant authorizing the installation of a GPS device, but also to the Government's theory in the instant case that such a device may be implanted even **without a search warrant** on the theory that there is **no Fourth Amendment search or seizure because there is no expectation of privacy** as to a person's movements on a public highway. Moreover, the Government argues that there is no need for probable cause or even reasonable suspicion to place a tracking device on any automobile. *See* Pet. Br. pp. 15-16.

The expectation of privacy rationale is deeply problematic. If the Government were to announce and make known that it was recording all cell phone calls, preserving copies of all e-mails, intercepting all faxes, using cell phones to monitor conversations in a room even when no call was in progress, and that it had entered into an agreement with OnStar, TomTom, and Garmin to monitor in real time the position of all cars using that GPS equipment, one could say that no American would have any reasonable expectation of privacy. According to the Government's theory then, no American would be able to claim that a Fourth Amendment search or a seizure of those communications or data transmissions had occurred.

Moreover, if the Government has the right to place a GPS device on a citizen's automobile to gather movement data, because no citizen has any reasonable expectation of privacy, why would that not automatically grant to all citizens a reciprocal right to place a GPS device on their neighbor's car, or even on a government official's car? Surely neither the

neighbor nor the government official would have any different expectation of privacy. No doubt, however, if any citizen were to be so bold, the Government would be quick to indict him, *inter alia*, for trespassing on government property — a trespass that the Government would certainly not consider "technical." In a country where the people are sovereign, government officials cannot be considered above the law.

Over the years, the Court has gradually relied more and more upon the right to privacy as one of the "penumbras, formed by emanations from" the Fourth Amendment. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). It eventually eliminated any reliance on property rights in Katz, relying only on the "reasonable expectation of privacy" test. *See* U.S. v. Knotts, 460 U.S. 276, 280 (1983). In Knotts, Chief Justice Rehnquist revealed unmistakably that Brandeis' privacy right had been grafted onto the Fourth Amendment.

Under the reasonable expectation of privacy test this Court has overridden property rights by allowing warrantless searches of commercial property,[11] closely regulated industries,[12] and a private residence for

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[11] *See* Donovan v. Dewey, 452 U.S. 594 (1981).

[12] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry); United States v. Biswell, 406 U.S. 311 (1972) (federal firearms dealers); New York v. Burger, 482 U.S. 691 (1987) (junkyard).

violations of a housing code,[13] among others. This Court's "expectation of privacy" test has proven wholly inadequate to the task of protecting the American people against invasions of their privacy through unreasonable searches and seizures. Paradoxically, a return to the text and property basis of the Fourth Amendment would provide much greater protection for what are thought of as privacy rights.

III. THE FOURTH AMENDMENT SECURES TWO RELATED, BUT DISTINCT, PROPERTY RIGHTS.

It has become commonplace in modern American legal practice to address constitutional issues with only passing reference to the constitutional text and the historical and legal context. This tendency has been especially pronounced in Fourth Amendment litigation which, since Warden v. Hayden and Katz v. United States, has been dominated by the judge-created standard of a "reasonable expectation of privacy." The word, "privacy," however, is not found anywhere in the Fourth Amendment text. Yet, by habitual use, "privacy" terminology has overshadowed, indeed even replaced, the actual text to the point that the original purpose of the Fourth Amendment — the protection of private property against "unreasonable searches and seizures" — has been lost.

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[13] *See* Camara v. Municipal Court, 387 U.S. 523 (1967),

It is, therefore, the purpose of this section first to reconstruct the text and its history and second to analyze the private property right protected be each of the Fourth Amendment's two distinct prohibitions — one against government seizures of private property to which the government has no superior rights, and the other against "general warrants."

A. The Textual Development of the Fourth Amendment Demonstrates that It Protects Two Distinct Rights.

On June 8, 1789, James Madison offered in Congress "his long-awaited amendments" to the United States Constitution, as they had been recommended by several state ratification conventions. *See* Sources of Our Liberties, pp. 421-24 (R. Perry & J. Cooper, eds., Rev. Ed., American Bar Foundation: 1978) (hereinafter "Sources"). Among those proposed amendments was the following text, the precursor to what would become the Fourth Amendment of the Constitution set forth in the Bill of Rights:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, **shall not be violated by warrants** issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, and the persons or things to be seized. [5 The Founders' Constitution, p. 25 (P. Kurland & R. Lerner, eds.: Univ. of Chicago Press: 1987) (hereinafter "Founder's Constitution") (emphasis added).]

Madison's text reflected Section 10 of the 1776 Virginia Declaration of Rights, which secured to the people only the right to be free from general warrants:

> That general warrants, whereby an officer ... may ... search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not be granted." [Sources, p. 312.]

Virginia's Declaration did not stand alone. Similar provisions appeared in the original Delaware, North Carolina, and Maryland Declarations of Rights. *See* Sources, pp. 339 (Delaware), 348 (Maryland), and 355 (North Carolina).

However, four other states adopted a different type of declaration, indicating that the protection against general warrants was but a subset of an overarching property right. The 1776 Pennsylvania Declaration took the lead, stating:

> That the people **have a right to hold** themselves, their houses, papers, and possessions **free from search and seizure, and therefore** warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer ... may be commanded ... to search suspected places, or to seize any person ..., his property ..., not particularly described, **are contrary to that right,** and ought not be granted." [Sources, p. 330 (emphasis added).]

Similar direct protections of property rights appeared in the 1777 Vermont, the 1780 Massachusetts, and the 1784 New Hampshire Declarations. *See* Sources, pp. 366 (Vermont), 376 (Massachusetts) and 384 (New Hampshire). The latter two began with a single sentence, remarkably similar to the first phrase of the ratified Fourth Amendment: "Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions."

In contrast, Madison's initial proposal would have protected the "rights of the people to be secured in their persons, their houses, their papers, and their other property" **only** from general warrants. Instead, Congress submitted to the States for ratification a much more muscular Fourth Amendment, which reads:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, **and no** warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added.]

In striking "by" from Madison's original draft, and substituting "and no" preceded by a comma, Congress changed Madison's single subject sentence into a compound one,[14] setting forth two distinct, albeit

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[14] *See* W. Strunk and E.B. White, The Elements of Style, pp. 5-6 (3d ed. 1979).

related, rights. *See* N.B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, p. 103 (Johns Hopkins Press: 1937). The first phrase affirmatively secures the people's unalienable right to private property, and the other protects the property rights of the people from execution of general warrants even where the Government has a superior property interest.

B. The Fourth Amendment's First Guarantee Secures the Unalienable Right of the People to Private Property unless the Government Demonstrates a Superior Property Right.

By its grammatical change, Congress signified that, separate from the warrant requirement, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, **shall not be violated....**" (Emphasis added.) While the Massachusetts and New Hampshire Declarations stated this right in principle, the Fourth Amendment added teeth to the principle — stating that those inherent property rights "shall not be violated."

Thus, in the seminal Fourth Amendment case of Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court considered the threshold question to be:

> Is a search and seizure ... **of a man's private papers**, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud

> against the revenue laws ... an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution? [*Id.* at 622 (emphasis added).]

In answer to that question, the Court did not explore whether the subpoena in Boyd met the Amendment's second phrase — the warrant requirement. Rather, the first guarantee stood on its own. Thus, the Court asked whether the "papers" sought by the Government were subject to seizure at all, no matter how specifically identified, and no matter how supported by evidence of probable cause. After all, the right to "private property," like the rights to "personal security" and "personal liberty," was "indefeasible." [*Id.* at 630.]

1. The Fourth Amendment Protects an Indefeasible Right of Private Property.

As noted above, the Fourth Amendment's prohibition against "unreasonable searches and seizures" is derived from the similar language found in Article XIV of the Massachusetts Declaration of Rights and in Article XIX of the 1784 New Hampshire Declaration of Rights. *See* Sources, pp. 376, 384. Both Declarations lay as their foundational principle that "all men are born free and equal and have certain natural, essential, and unalienable rights; among which [are] the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property...." Article I of the Massachusetts Declaration, reprinted in Sources, p. 374. *Accord*,

Article II of the New Hampshire Declaration, reprinted in Sources, p. 382.

Because the people's right to private property was inherent, God-given and unalienable, any search or seizure of any person's property would be "unreasonable" unless it could be shown that the property searched for or seized either did not belong to the person, or had been forfeited by some illegal act. Thus, the Boyd Court began its analysis with a quote from the 1765 English case of Entick v. Carrington[15]:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. [Boyd, 116 U.S. at 627.]

From this constitutional premise, the Boyd Court found that a

> [S]earch for and seizure of **stolen or forfeited goods, or goods liable to duties** and concealed to avoid the payment thereof [were] totally different things from a search and seizure of a man's private books and papers for the purpose of obtaining **information** therein contained, or of using them as **evidence** against him. The two things are toto coelo. In the one case, the Government is **entitled**

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[15] 19 Howell's State Trials 1029 (1765).

> to possession of the property; in the other it is not. [*Id.*, 116 U.S. at 623 (emphasis added).]

From this principled distinction, it follows that any Government search for, or seizure of, any person, house, paper or effect for the purpose of obtaining either **information or evidence**, without any claim of a superior property interest is **unreasonable *per se*** and a violation of the Fourth Amendment — with or without a properly issued and verified warrant. *See* Berger v. New York, 388 U.S. 41, 67 (1967) (Douglas, J., concurring). As a unanimous Supreme Court ruled in Gouled v. United States, 255 U.S. 298 (1921):

> [S]earch **warrants** ... may **not be used** as a means of gaining access to a man's house or office and papers **solely for the purpose of making search to secure evidence to be used against** him.... [*Id.*, 255 U.S. at 309 (emphasis added).]

And, as this Court also ruled in Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385 (1920), the Fourth Amendment condemns any Government search or seizure of a man's property solely "to avail itself of the **knowledge** obtained by that means which otherwise it would not have had." *Id.*, 251 U.S. at 391.

Applied thusly, the Fourth Amendment serves as a robust means to ensure protection of a property owner's Fifth Amendment's privilege against self-incrimination. *See* n.8, *infra*. To the Boyd Court, this was both obvious, and intentional. *Id.*, 116 U.S. at 633. And it reinforced the **"mere evidence" rule**, as stated in Gouled, that "warrants that authorized seizures of

items other than fruits of a crime, instrumentalities of a crime, or contraband were invalid." *See* C. Whitebread, Criminal Procedure, § 5.04(a), p. 119 (Foundation Press: 1980).

2. The Fourth Amendment Secures an Indefeasible Property Right to One's Person.

Unquestionably, the plain language of the Fourth Amendment concerns the right to private property — both real and personal. In the parlance of the founders, even the reference to "persons" connoted the property right that each individual human being has in his own person. In his Second Treatise, John Locke begins his chapter on property with the proposition that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself." J. Locke, Two Treatises of Government, II, § 27 (Cambridge Univ.: 2002) (italics original). Indeed, according to Locke, one's person is "*the Great Foundation of Property*," for by an individual's "being master of himself and *Proprietor of his own Person,*" an individual human being accumulates property by his "labour," and thus, title to it. *Id.* at §§ 44 and 51 (italics original). For Locke, the right to private property was a gift of "God and Reason," which commanded him "to subdue the earth" and by his labor to annex the property produced and accumulated to which "another had no Title to, nor could without injury take from him." *Id.*, § 32.

In a 5 to 4 decision, however, this Court refused to apply this founding property principle to a wiretap on

a person's telephone line on the sole ground that the Fourth Amendment protected **only** "material things." Olmstead v. United States, 277 U.S. 438 (1928). While this Court has overruled Olmstead, it did so on the ground that it was inconsistent with this Court's Fourth Amendment privacy doctrine.[16] Instead, the Olmstead ruling was an egregious violation of the Fourth Amendment's property principles. When subjected to a historical and textual property analysis, Olmstead was surely wrong to have concluded that the Fourth Amendment protects only "material things."

Foremost, the Fourth Amendment protects "persons." As Justice Butler pointed out in his Olmstead dissent:

> Telephones are used generally for transmission of messages concerning official, social, business, and personal affairs including communications that are private and privileged — those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications **belong to the parties between whom they pass.** During their transmission the exclusive use of the wire **belongs** to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a

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[16] *See* United States v. Knotts, 460 U.S. 276, 280 (1983).

> search for **evidence**. As the communications passed, they were heard and taken down. [*Id.*, 277 U.S. at 487 (Butler, J., dissenting) (emphasis added). *See also* Berger, 388 U.S. at 64 (Douglas, J., concurring) ("my overriding objection to electronic surveillance [is] that it is a search for 'mere evidence'...").]

Indeed, as Professor James B. White has insightfully observed, there is nothing in the language of the Fourth Amendment that dictates the Olmstead Court's conclusion that words cannot be "seized," especially in light of "[a]nalogies from **property** law [whereby] words can be made the object of **property** [so that] the right to say or write them can be bought and sold." J. B. White, "Judicial Criticism," 20 *GA. L. REV.* 835, 851-52 (1986) (emphasis added).

C. The Fourth Amendment's Prohibition against General Warrants Protects Persons and Their Property from Indiscriminate and Surreptitious Searches.

In his 1761 attack on Writs of Assistance, James Otis asserted that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[17] Even to this day, the symbolism of a castle is powerful — privately owned property possessed to the exclusion of everyone else, strong walls, perhaps even a moat,

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[17] James Otis, "Against Writs of Assistance" (Feb. 1761). http://www.nhinet.org/ccs/docs/writs.htm.

evidencing the presence of another type of government behind those walls — the government of the family.[18] The civil government was not to trespass on the property of the family government except within remarkably narrow confines.

At the heart of the warrant requirement is the Fourth Amendment's complete ban on general warrants. As the Supreme Court observed in Weeks v. United States, 232 U.S. 383 (1914):

> Resistance to [general warrants and writs of assistance] established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers. [*Id.*, 232 U.S. at 390.]

As is true of the first guarantee of the Fourth Amendment, so it is true of the second — the warrant requirement was designed to protect the people's rights to private property. It does so in at least two significant ways.

First, the prohibition against general warrants is designed to particularize any government search and seizure to only such private property to which it may

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[18] The notion of the family as a type of government has deep roots. *See, e.g.*, Abraham Kuyper, "Lecture on Sphere Sovereignty" (Oct. 20, 1890). http://www.reformationalpublishingproject.com/pdf_books/Scanned_Books_PDF/SphereSovereignty_English.pdf.

lay a superior property or proprietary claim. *See* T. Cooley, A Treatise on Constitutional Limitations, pp. 371-72 (5th Ed. 1883). Thus, this Court ruled in Gouled that a warrant "may not be used [to justify a] search to secure evidence to be used against him," but only when the Government or complainant has a "primary right" in the property to be seized. *Id.*, 255 U.S. at 309 (emphasis added). By outlawing general warrants, government officials would be stopped from engaging in the practice of rummaging through one's private property looking for incriminating information or evidence. *See* Boyd, 116 U.S. at 625-26 ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of a public offense....").

Second, even as to a Government's particularized claim of "primary right," absent special circumstances, the warrant requirement interposes a judicial officer between an executive officer and private property owner, commanding the executive officer **prior to a search** to demonstrate, by oath or affirmation, to the satisfaction of the judicial officer that the executive officer has "probable cause" to seize a particularly described place to be searched, and a particularly described person or thing to be seized. As Justice Stevens observed, "this restraint [is] a bulwark against police practices that prevail in totalitarian regimes." California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting).

It was, indeed, meant to be so. In his Treatise on Constitutional Limitations, Thomas Cooley summarized the primacy of a person's property rights over lawless entries upon those rights:

> [T]he law favors the **complete and undisturbed dominion** of every man over his own premises, and protects him therein with such jealousy that he may **defend his possession** against intruders.... [*Id.* at 374 (emphasis added).]

Yet, even a"heightened expectation of privacy in one's home," has proved to be a weak substitute, unable to protect the common law right of a property owner to "resist an unlawful police entry into a home" — a right which the Indiana Supreme Court recently ruled to be "against public policy and ... incompatible with modern Fourth Amendment jurisprudence." *See* Barnes v. Indiana, 946 N.E. 2d 572 (Ind. 2011), *aff'd on reh'g*, 2011 Ind. LEXIS 815 (Ind. Sept. 26, 2011).

Such erosion of the protections of the Fourth Amendment contributes in no small part to the growing loss of confidence in government by the American People.[19] Rather than seeing government as

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[19] In addition to innumerable news articles and web stories, a series of studies and popular books have focused renewed attention on the militarization of police, the increasing use of "dynamic entry" by SWAT teams into homes and businesses by law enforcement at all levels of government — estimated to be as high as 40,000 per year. *See* Radley Balko, Overkill: The Rise of Paramilitary Police Raids in America, CATO Inst. (2006), p. 11. Videos detailing abusive STAT Team Raids into homes and businesses circulate widely on the Internet. *See, e.g.*, WCCO

the protector of its rights, an astonishing 46 percent of Americans (and 66 percent of Republicans) now believe "the federal government poses an immediate threat to the rights and freedoms of ordinary citizens...."[20]

Television Report, "SWAT Team honored for raiding wrong house," (July 29, 2008) http://www.youtube.com/watch?v=oFnmZKl5WEA&feature=related; "Gibson Guitar Corp. Responds to Federal Raid" (Aug. 25, 2011). http://www.gibson.com/en-us/Lifestyle/News/gibson-0825-2011/. *See generally* Paul Craig Roberts and Lawrence M. Stratton, The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of Justice, Three Rivers Press (2008); In the Name of Justice, CATO Inst. (Timothy Lynch, ed., 2009); Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent, Encounter Books (2009); Paul Rosenzweig and Brian W. Walsh, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty, Heritage Foundation (2010); and Go Directly to Jail: The Criminalization of Almost Everything, CATO Inst. (Gene Healy, ed., 2004).

[20] Gallup Poll, "Republicans, Democrats Shift on Whether Gov't is a Threat," (Oct. 19, 2010). http://www.gallup.com/poll/143717/Republicans-Democrats-Shift-Whether-Gov-Threat.aspx

IV. THE ATTACHMENT AND USE OF THE GPS TRACKING DEVICE VIOLATED THE FOURTH AMENDMENT BAN ON UNREASONABLE SEARCHES AND SEIZURES.

A. The Attachment of a GPS Tracking Device to Respondent's Vehicle Constituted an Unreasonable Search and Seizure.

The Government has argued that the "attachment" of a GPS tracking device on the "exterior" of the Jones' Jeep was at most a "technical trespass," and therefore, was neither a search nor a seizure within the meaning of the Fourth Amendment. *See* Pet. Br. pp. 39-46. The Government offers two reasons for its position. First, it contends that there was no search or seizure because Jones had "no reasonable expectation of privacy in the exterior of the vehicle." *Id.*, pp. 39-42. Second, it contends that there was no search or seizure because the attachment did not "meaningfully interfere with [Jones'] possessory interest in the vehicle." *Id.*, pp. 42-46. The Government's minimalist approach to search and seizure utterly fails to take into account the security afforded Jones' private property by the Fourth Amendment, as it was originally written and purposed.

The Government demonstrates its total disregard for the historic common law foundation upon which the Fourth Amendment ban on searches and seizures is based. In Entick v. Carrington, Lord Camden observed:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing....

At common law, a "technical trespass" would have been akin to a person walking across the corner of his neighbor's lawn — an almost unthinking or unintentional intrusion, and something that the average property owner would not have considered to be a "meaningful" interference with his right to exclusive possession. *See* W. Prosser, Law of Torts, 63-64 (4th ed. 1971). Attachment of the GPS device is hardly analogous to an unthinking "modest intrusion," as the Government asserts. *See* Pet. Br. p. 16. Rather, it was a deliberate act that the Government made every effort to keep secret, and had Jones known about the device, he would have removed it.

According to the Government's line of reasoning, however, a trespass is a technical one when the trespasser's interest is of greater importance than the property owner's. *See* Pet. Br. p. 16. Such a balancing act elevates the flagrant trespasser over the property owner. However, this Court has protected private property rights "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 435 (1982).

Furthermore, the Government has misstated the nature and extent of the intrusion upon Jones' property

rights by the attachment of the GPS device. The Government maintains that the only intrusion made by the attached device is to the "exterior" of Respondent's Jeep. *See* Pet. Br. pp. 39-41. The Government argues that there was neither a search nor a seizure because "temporarily attaching a nonintrusive GPS device to the exterior of respondent's vehicle and using the device did not penetrate or occupy any 'constitutionally protected area'; it made only **ephemeral contact** with the exterior of respondent's vehicle." *See* Pet. Br. p. 46 n.6 (emphasis added).

Again, the Government downplays the severity of its interference with Jones' dominion over his property. *See* Pet. Br. pp. 15-16. The Government insists that the attachment of a GPS tracking device provides no information about the movement of Jones' vehicle that could not be provided by eye witnesses along the public thoroughfares, and that the device only makes visual surveillance by government agents more "efficient" and less costly. *See* Pet. Br. pp. 18-20. But GPS tracking is dramatically and fundamentally different from conducting visual surveillance from outside a vehicle, such as the physical tailing of a suspect.

By attaching the GPS tracking device to the Jones Jeep, the Government eliminated both the risk of human error and the risk of external interferences that accompany visual surveillance. It did so by virtually placing a trespassing robotic passenger onto the Jones Jeep without Jones' knowledge or consent in violation of Jones' right of exclusive possession of the vehicle. *See* Resp. Br. pp. 47-48. By obtaining information that it "could not otherwise have ... obtained without

physical 'intrusion into a constitutionally protected area,'" the attachment of the device itself violated the Fourth Amendment ban on unreasonable searches and seizures. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001). And that attachment was hardly transient, remaining on the Jones vehicle continuously for four full weeks.

B. The Use of the GPS Tracking Device Violated the Fourth Amendment.

There is no dispute in this case that the Government, by using the GPS tracking device, seeks and obtains data on the movement of the Jones Jeep. While utilization of the data may lead the Government to the fruits of a crime, contraband, or an instrumentality of a crime, the Government makes no pretense that it has any proprietary interest in the information generated by the GPS device. Rather, its interest then, and its interest now, is to use the GPS-generated data as evidence to secure Jones' conviction. As discussed above in Part III.B., *supra*, the Fourth Amendment, as written, protects against any coercive effort by the Government to search for, or to seize, "mere evidence." And for that reason, alone, the Government's use of the GPS data violates the Fourth Amendment. *See* Gouled, 755 U.S. at 309.

To be sure, this Court rejected the "mere evidence" rule in Warden v. Hayden, 387 U.S. 294 (1967). For the reasons stated in Part III, *supra*, *amici* urge the Court to overrule that determination in Hayden and reinstate the "mere evidence" rule embraced by this

Court for 81 years before being unwisely and erroneously discarded.

C. Attachment and Use of a GPS Tracking Device Is an Unlawful General Warrant.

The attachment and use of a GPS tracking device is akin to a general warrant, allowing federal agents to gather information without the Government having to meet the particularity requirements of the Fourth Amendment. As Respondent points out, "the government made no effort to stop or minimize the GPS device's indiscriminate tracking of the jeep in the event that Mrs. Jones, the Joneses' college-age son, or someone other than Jones were to use the vehicle." Resp. Br. p. 4.

When federal agents obtain wiretapping warrants to intercept a suspect's communications, they statutorily have been subject to strict minimization requirements. 18 U.S.C. Section 2518(5) requires that wiretapping "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter...." Thus, if the participants in the conversation are not the suspect, or the topic of the conversation does not involve the suspected illegal activity, agents must take steps to minimize their monitoring of such communications.

GPS tracking devices cannot similarly discriminate. As the Government points out, such devices do not determine who is driving the vehicle at any particular time, and do not stop tracking when the car is being driven by persons who are not suspected of any

wrongdoing. *See* Pet. Br. p. 4. Nor are the devices capable of distinguishing between the type of journey that is being surveyed — they are not able to differentiate between a trip to a stash house, and a family vacation to the beach. Rather, they indiscriminately target all movements by all persons who happen to be driving or riding in the targeted vehicle. Even in this case, the district court suppressed data tracking the movement of the Jones' Jeep on private property. Even if not in this case, such broad surveillance is sure to gather highly personal information that is unrelated to any investigation — such as the dates, times, and locations of an individual's social dates, a client's meetings with his lawyer, a patient's meetings with his doctor, and a politician meetings with his allies.

Thus, by the very nature of GPS tracking devices, there are no steps that the Government may take to particularize the "movements" of the vehicle — namely those of Mr. Jones — as required by the Fourth Amendment requirement that the "things to be seized" must be specifically identified by the warrant. Indeed, the movements of the Jeep are immune from seizure whenever there is an ancillary trespass because "no warrant could properly issue for them (since it would never be possible to meet the particularity requirements of the warrant clause)." *Cf.* J. B. White, "Judicial Criticism," 20 *GA. L. REV.* 835, 851 (1986).

CONCLUSION

Although crafted by the Court in Katz to strengthen the Fourth Amendment to protect legitimate privacy interests increasingly threatened by the technological revolution, the Court's insistence that one's privacy expectation be "reasonable" has undermined that protection. As this brief demonstrates, a return to the Amendment's original property principles promises greater protection to privacy interests.

For the reasons set out above, the judgment of the U.S. Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

ANTOINE JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE FIRST AMENDMENT LAWYERS ASSOCIATION, THE DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit professional bar association that represents the nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states.[1]

In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fourth Amendment, and its state analogues, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. Particularly, as relates to the issues before the Court in this case, NACDL has an interest in protecting both privacy and associational rights from

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of records for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letter on file with the Clerk's office.

unwarranted and unreasonable government intrusion, precisely that area in which the First and Fourth Amendments intersect. Notably, NACDL filed an *amicus curiae* brief with the New York State Court of Appeals in *People* v. *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (N.Y. 2009), arguing that the surreptitious installation of a GPS device and subsequent around-the-clock electronic tracking and recording of movements without spatial or temporal limitations is impermissible absent a warrant based upon probable cause. NACDL also filed as an *amicus curiae* in June 2011, making the same argument under the U.S. Constitution, in *State* v. *Johnson*, No. 2011-0033, (Ohio filed Jan. 6, 2011) (case below 190 Ohio App.3d 750 (Ohio App. 12 Dist., 2010)).

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and the limits of executive power in the fight against terrorism. The Brennan Center's Liberty and National Security (LNS) Program fights to ensure that our nation's commitment to national security comports with the rule of law and fundamental freedoms through innovative policy recommendations, litigation, and public advocacy. The Center's LNS Program is particularly concerned with domestic counterterrorism policies, including the use of increasingly powerful surveillance tools and tactics, and their effects on privacy and First Amendment freedoms. As part of this effort, the Center recently published a report on the 2008 Attorney General's Guidelines for Domestic FBI Investigations. See EMILY BERMAN, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS (2011). It

has also filed numerous *amicus* briefs on behalf of itself and others in cases involving electronic surveillance and privacy issues, including *Amnesty Int'l USA* v. *Clapper*, 638 F.3d 118 (2d Cir. 2011), *Hepting* v. *AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008), and *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008).

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals that engage in constitutionally protected expression and association. FALA's members practice throughout the United States in defense of First Amendment freedoms and, by doing so, advocate against government forms of censorship and intrusion. Member attorneys frequently litigate the constitutionality of police activity, often examining the intersection between the Fourth Amendment warrant requirement and the right to First Amendment expression and association. Given the nationwide span of their experience and the particularized nature of their practices, FALA attorneys are uniquely poised to comment on the important constitutional issues raised in this case.

The District of Columbia Association of Criminal Defense Lawyers (DCACDL) is, as its name implies, the local District of Columbia affiliate of the National Association of Criminal Defense Lawyers. Its members practice criminal law in the District of Columbia, both in local and federal courts, and include private practitioners, public defenders, attorneys accepting court appointments and law professors. The goals of DCACDL include promoting the proper administration of criminal justice in the District of Columbia; fostering, maintaining and encouraging integrity, independence and expertise of

defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research. In *United States* v. *Maynard*, 615 F.3d 544 (D.C. Cir.), *rehearing en banc denied*, 625 F.3d 766 (2010), our D.C. Circuit Court of Appeals (2010) found a warrant requirement for GPS surveillance. As such, DCACDL has a keen interest in preserving the First and Fourth Amendment as applied to law enforcement activities in the District of Columbia.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a not-for-profit corporation with a subscribed membership of more than 600 attorneys, which includes private practitioners, public defenders and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research, to include appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar. Indeed, NYSACDL has a keen interest in this issue and appeared as an *amicus curiae* before the New York Court of Appeals in 2009 in *People* v. *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (N.Y. 2009). In that case, the court found a warrant

requirement for GPS surveillance under New York's state constitution.

The Ohio Association of Criminal Defense Lawyers (OACDL) is a membership organization of 723 lawyers working together to: defend the rights people accused of committing a crime; educate and promote research in the field of criminal defense law and the related areas; train attorneys through lectures, seminars and publications to develop and improve their abilities; advance the knowledge of the law as it relates to the protection of the rights of persons accused of crimes; and educate the public about the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties. OACDL recently appeared as an *amicus curiae* in the GPS warrant case *State* v. *Johnson*, No. 2011-0033, (Ohio filed Jan. 6, 2011), arising under the U.S. Constitution and currently pending before the Supreme Court of Ohio (case below 190 Ohio App.3d 750 (Ohio App. 12 Dist., 2010)).

SUMMARY OF ARGUMENT

The tracking procedures utilized in this case violate not only the Fourth Amendment's unreasonable search and seizure provisions, but also First Amendment associational rights and the privacy protections that are essential to the freedoms specified in both the First and Fourth Amendments.

The principal protection against such constitutional violations is a warrant. It is easy for authorities to get one. Thirty-four states and the District of Columbia no longer require officers to appear personally before a magistrate, but permit them to telephone or use other "electronic means" to make a warrant application in the field.

Finally, the monitoring practices for which the Solicitor General and his *amici* now seek broad license find no support in the so-called "automobile exception." The reasons for that exception – destruction or carrying away of evidence, and officer safety – fall away when the automobile is not the subject of a stop, but is instead seized in a different way; that is, as a surrogate for monitoring all of the travels and activities of a particular individual.

Amici respectfully request that the Court affirm.

ARGUMENT

I. WARRANTLESS GPS SURVEILLANCE IMPOSES AN UNACCEPTABLE BURDEN ON FIRST AMENDMENT ASSOCIATIONAL RIGHTS, AS WELL AS FOURTH AMENDMENT PRIVACY RIGHTS

Americans enjoy a constitutionally protected, fundamental right of freedom of association as much as they enjoy a fundamental right to be free from unreasonable searches and seizures. See U.S. Const. amends. I. and IV. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrants of Property at 104 E. Tenth St.*, 367 U.S. 717, 729 (1961). Thus, the Fourth Amendment's protection of privacy rights also serves the important function of protecting associational rights. See *Katz* v. *United States*, 389 U.S. 347 (1967) (noting that Fourth Amendment concerns are heightened where associational interests are also at stake). Clandestine installation of GPS tracking devices and their surreptitious data collection

without judicial oversight imperils both of those fundamental rights.

As this Court has long recognized, "[t]he commands of our First Amendment (as well as the prohibitions of the Fourth and Fifth) . . . are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965) (internal citations omitted). A critical and essential aspect of both of these freedoms is the right to keep one's associations private. *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations."). Therefore, even setting aside the Fourth Amendment privacy invasion inherent in round-the-clock clandestine monitoring and recording of one's movement without spatial or temporal limitation, in the absence of a warrant supported by probable cause, government actions that reveal lawful and private associational relationships violate the First Amendment's guarantee of freedom of association. See *id.* (holding that Alabama could not constitutionally compel the NAACP to reveal the identities of its members).

Surreptitious GPS surveillance by law enforcement officials, particularly over time, reveals exactly these kinds of associational relationships. With the secret use of around-the-clock GPS surveillance, the government can ascertain, compile, and collect information concerning membership and attendance at both private and public gatherings as effectively as if compulsory disclosure of membership data were required. Indeed, "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *United States* v. *Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010).

Additionally, the Fourth Amendment prohibits this technologically enabled, unlimited, and unprecedented incursion on privacy that GPS tracking facilitates. The technology used here permits law enforcement to monitor more than simply an individual's travel from point A to point B, and it has far greater capacity than mere enhancement of visual surveillance. Rather, it permits law enforcement to remotely track and record an individual's complete, uninterrupted pattern of movement for an unlimited duration, in an unlimited space, both public and private. It permits the creation of a complete, virtual profile that is compiled and maintained by the government.

> The fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on

> this Court in its supervision of the fairness of procedures in the federal court system.

Lopez v. *United States*, 373 U.S. 427, 441 (1963) (Warren, C.J. concurring).

Judicial oversight is an essential safeguard for ensuring that such surveillance does not impinge on associational rights or privacy rights. Because of the important and fundamental rights at stake, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 460–61. Therefore, law enforcement officials bear the burden of proving that prolonged GPS monitoring is a "narrowly tailored measure[] that further[s] compelling governmental interests." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995); *accord NAACP*, 357 U.S. at 464 (requiring "substantial[]" governmental interests). Only a neutral adjudicator can determine if this burden has been met, by requiring law enforcement officials to show probable cause before issuing them a warrant.

A. GPS surveillance burdens and reveals constitutionally protected associational information in violation of First Amendment rights.

Freedom of association, a fundamental and constitutionally protected right, includes the right to keep those associations private. *NAACP*, 357 U.S. at 462 (recognizing "the vital relationship between freedom to associate and privacy in one's associations" (internal quotation marks omitted)); *accord Katz*, 389 U.S. at 350 n.5 ("The First Amendment, for example, imposes limitations upon governmental abridgment of freedom to associate and privacy in one's associations." (internal quotation

marks omitted)). Thus, searches or seizures that reveal private associations unconstitutionally infringe on the freedom of association. See *NAACP*, 357 U.S. at 462.

In *NAACP*, an Alabama court entered a contempt judgment against the NAACP for failing to disclose the names and addresses of its members. *Id.* at 453–54. In reversing the contempt judgment, this Court held that "the immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of" the First Amendment. *Id.* at 466. The Court further held that compelling the NAACP to disclose the names and addresses of its members was a "substantial restraint upon the . . . right to freedom of association," because "it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure . . . ." *Id.* at 462–63.

Even short-term GPS data collection, especially when combined with publicly available information, *e.g.*, Google Maps, http://maps.google.com, can reveal private associational relationships based on whom an individual visits over the course of a day, be it a chapel or a mosque; a Sierra Club protest or a Tea Party rally; the offices of the NAACP or those of the NRA.

The facts revealed by GPS monitoring comprise precisely the sort of private associational information that is constitutionally protected by the First Amendment. Surreptitious GPS monitoring that reveals an individual's church-going habits or political activities, for example, operates as effectively to reveal private associations as would a "requirement that adherents of particular religious

faiths or political parties wear identifying arm-bands." *NAACP*, 357 U.S. at 462 (internal quotation marks omitted).

Unlimited, twenty-four-hour GPS surveillance "reveals the habits and patterns that mark the distinction between a day in the life and a way of life . . . ." *Maynard*, 615 F.3d at 562. Giving law enforcement officials free rein to conduct such surveillance, without any oversight whatsoever, allows the government to combine information about the private habits and patterns of multiple individuals. In so doing, the government forms a detailed and overarching composite picture of private associational relationships.

Given the ability to track, download, store, and retrieve vast historical detail of one's life without judicial oversight (i.e., in the manner urged by Petitioner) the government will have free rein to harvest volumes of data about individuals' habits and patterns. Sustained, unlimited 24-hour surveillance without temporal or spatial limitation reveals not just public exposure of one's location at a discrete point in time, but also patterns, practices, affiliations, and constitutionally protected associations. The balance between this liberty-and-privacy interest and legitimate law enforcement objectives can be preserved only by requiring that law enforcement demonstrate probable cause to undertake far-reaching and invasive surveillance.

B. In the absence of a warrant supported by probable cause, the surreptitious installation of a GPS device that tracks and logs an automobile's travels around the clock without spatial or temporal limitation is a search in violation of the Fourth Amendment.

This Court has "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable [and] reasonable . . . expectation of privacy . . . ." *United States* v. *Knotts*, 460 U.S. 276, 280 (1983) (internal quotation marks omitted). The surreptitious installation of a GPS device combined with unlimited, remote, 24/7 monitoring and recording of a driver's movements infringes on the level of privacy that a technologically maturing society expects and is prepared to recognize as reasonable.

There is ample evidence that the non-consensual monitoring of a complete pattern of an individual's movement is something that society expects the law to protect throughout the country, including but not limited to civil suits, criminalization of the conduct, legislative regulation, public commentary and judicial opinions. See *e.g.* Res. Br. at 2, 3, 22 n.4. Clandestine, around-the-clock technological monitoring of the type at issue here, whether on public or private property, is a search that violates the Constitution in the absence of a warrant supported by probable cause.[2]

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[2] While Petitioner and other courts take great pains to distinguish tracking of a vehicle on public roads versus private property, such distinctions are constitutionally and practically flawed. First, in reality the devices do not determine much less

The organizations joining on this brief, however, also have a particular concern about automobiles and their susceptibility to unwarranted intrusion by law enforcement. The ubiquity and reliance on the automobile in American society, coupled with the physical inability of an individual to personally shield oneself from such intrusion, establishes a subjective expectation of privacy. That is all the more reason for judicial oversight of GPS monitoring.

The widespread dependence on automobiles makes protecting owner privacy even more critical. In *Katz*, this Court stated that there is no reasonable expectation of privacy where a person has not taken measures to exhibit an actual expectation of privacy. *Katz*, 389 U.S. at 359, 361. This test cannot apply to a target of secret GPS surveillance because there is no reasonable method for one to exhibit an expectation of privacy. It is unreasonable to expect drivers to check under their vehicles, in the wheel wells, under the hood, etc., each time they get behind the wheel.

Likewise, it is also unreasonable to expect or require citizens to demonstrate their expectation of privacy by forfeiting the use of private transportation by using alternative means such as walking or taking public transportation. This is especially so when

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anticipate when they will cross from the public to private property any more than they anticipate crossing state lines. They continue to track, record, and download regardless of their global position. Furthermore, the public–private road distinction ignores the development of Fourth Amendment jurisprudence away from neat "locational" boundaries, particularly in the technological arena. *See Katz*, at 352 n.9 ("It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas' but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." (internal citation omitted.)

such alternatives are impracticable and in many locations non-existent. Automobiles are such a vital and essential part of life for Americans that we have one of the highest number of vehicles per capita in the world. See William Pentland, *The World's Top Car-Owning Countries*, Forbes.com (July 30, 2008, 1:00 PM), http://www.forbes.com/2008/07/30/energy-europe-automobiles-biz-energy-cx_wp_0730cars.html (last visited on Oct. 2, 2011). Given the role of the automobile in public life, it is unreasonable to expect vehicle owners to take extraordinary steps to broadcast their expectations of privacy. The secret conversion by law enforcement of a modern life necessity into a transmitter of an individual's movements, without probable cause and absent judicial oversight, exploits the vital role of the car in everyday life and foreshadows broader and stealthier intrusions as society becomes increasingly technology-dependent for even the most basic of daily activities.

Law enforcement's ability to recreate an historical record of where an individual travelled, to monitor the frequency, duration, and destination of the individual's travels for time immemorial, is an intrusion of an unprecedented scope and scale. Its use by law enforcement requires the reasonable oversight that the limitations of the Fourth Amendment provide.

The GPS technology at issue in this case is merely the leading edge of previously unimaginable methods of monitoring individual movements and behavior. See, *e.g.*, Jennifer Valentino-Devries, *"Stingray" Phone Tracker Fuels Constitutional Clash*, Wall St. J. (Sept. 22, 2011), http://online.wsj.com/article/SB10001424053111904194604576583112723197574.html (last visited on Oct. 2, 2011) (reporting on a

secret law enforcement device used to mimic cell phone towers and locate individuals even when they aren't making a call). If the Fourth Amendment's proscription against unreasonable searches and seizures remains "designed to protect people and not places" in a world of advancing technologies, this Court must construe the clandestine installation, 24/7 remote surveillance, and digital recording of an individual's every move without limitation as to duration or location as a search mandating Fourth Amendment protection. *Katz*, 389 U.S. at 351.

C. Judicial oversight is the only way to ensure that these First and Fourth Amendment rights are protected.

Judicial oversight is an essential safeguard for ensuring that GPS surveillance does not impinge on associational rights. Any incursion by the government into constitutionally protected associational rights is subject to strict scrutiny. *NAACP*, 357 U.S. at 460–61 (holding that governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny"); *accord Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) ("[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State *convincingly show a substantial relation* between the information sought and a subject of *overriding and compelling* state interest." (emphases added)).

Nevertheless, Petitioner urges a rule of law whereby *absolutely no showing whatsoever* is required to use GPS monitoring to indirectly gather the kind of information that the law clearly proscribes it from gathering directly without judicial

oversight. Such sweeping discretion to law enforcement absent even the slightest judicial oversight is reminiscent of the very inspiration from which the Fourth Amendment has its genesis: the writs of assistance that gave blanket authority for officials to search where they pleased. See *Stanford*, 379 U.S. at 481. Those blanket writs were rightly described as "the worst instruments of arbitrary power, the most destructive of . . . liberty . . . and [of] the fundamentals of law, . . . because they placed the liberty of every man in the hands of every petty officer." *Id.* (internal quotation marks omitted).

Furthermore, individuals whose associational rights have been violated in this manner would have no recourse to vindicate their rights, because they would be unaware of the violation in the first place. Without a warrant requirement, law enforcement officials would only need to divulge their surreptitious GPS surveillance *after* it has yielded incriminating information—which would then serve as a *post hoc* showing of probable cause. See Pet'r's Br. at 16 ("[A] critically important use of GPS surveillance is . . . to *establish* probable cause."). Or, law enforcement could continue their fishing expeditions in silence, collecting volumes of information that may or may not be of use in future investigations. A warrant requirement, backed by a showing of probable cause, is a necessary check on what would otherwise be an unprecedented, unchecked investigatory power.

II. THE WARRANT REQUIREMENT IS MINIMALLY BURDENSOME, AS ILLUSTRATED BY THE FACTS OF THIS CASE.

Law enforcement can make no plausible argument of unreasonable burden justifying prolonged,

warrantless GPS surveillance, given the ease and speed with which search warrants can now be obtained. The vast majority of states—and the District of Columbia—have statutes or rules permitting warrant applications by telephonic or electronic means. And nearly half of the states have crafted procedural rules with broad language anticipating and embracing technological advancements that can further simplify the warrant-application process. Notably, the District of Columbia allows search warrant applications by virtually any electronic means.[3] It is therefore no surprise that the officers in this case did in fact obtain a warrant—one whose terms they proceeded to violate. See Pet'r's Br. at 3.

A. Advancements in technology have significantly streamlined the process of obtaining a search warrant.

In 1981, long before words like "smartphone" and "PDF" entered our collective vocabulary, this Court recognized that "[t]he additional burden imposed on the police by a warrant requirement is minimal." *Steagald* v. *United States*, 451 U.S. 204, 222 (1981). Thirty years and countless technological advancements later, that statement rings truer than ever. Indeed, many of the same technologies that help law enforcement detect criminality can also simplify and expedite police compliance with the warrant requirement.

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[3] *See* D.C. Code § 23-522 (2011) ("Each application for a search warrant shall be made in writing, or by telephone or *other appropriate means*, including facsimile transmissions or *other electronic communications*, upon oath or affirmation to a judicial officer, pursuant to the Superior Court Rules of Criminal Procedure." (emphasis added)).

Today, thirty-four states and the District of Columbia have codified procedures allowing law enforcement to apply for warrants remotely, using electronic or telephonic means.[4] Each of these jurisdictions has embraced one or more of the following technologies in an effort to streamline the warrant process:

Number of Jurisdictions Allowing Remote Warrant Application

Telephone	Facsimile	Radio	Video Conference	E-mail	Other Remote Means
24	18	6	2	2	23

The "other" category is particularly instructive in that it anticipates those future technologies that defy *ex ante* categorization. Vermont, for example, allows warrants to be issued "based on information communicated by reliable electronic means"—a term defined to include "facsimile transmission, electronic mail, *or other method[s]* of transmitting a duplicate of an original document." Vt. R. Crim. P. 41(c)(4)(A), 41(g)(2) (2011) (emphasis added). Today, this language could easily encompass warrant applications generated and signed on an officer's

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[4] These states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, and Wisconsin, in addition to the District of Columbia. This list does not include any states that may, through judicial decision only, allow remote warrant application.

iPad, saved as PDFs, and transmitted to the magistrate by e-mail. And it can likely accommodate the digital paper of tomorrow.

Utah's procedural rules contain even broader language. There, remotely issued search warrants are allowed where the magistrate and requesting party communicate by "voice, image, text, or any combination of those, or by *other means*." Utah R. Crim. P. 40(l)(1) (emphasis added). This rule allows Utah police to "get electronic warrants in about 20 minutes," according to one Utah County Sherriff.[5] Perhaps the most forward-looking language of all can be found in the laws of the District of Columbia, specifying that "[e]ach application for a search warrant shall be made in writing, or by telephone or *other appropriate means*, including facsimile transmissions or *other electronic communications* . . . ." D.C. Code § 23-522 (2011) (emphasis added).

To the extent that the government's preference for warrantless GPS surveillance in this case is "based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of the warrant," *United States* v. *Karo*, 468 U.S. 705, 717 (1984), it ignores the reality that today's warrant requirement is a lighter burden than it has ever been. The days of cumbersome in-person assemblies to secure warrants are plainly long gone, and so too is any plausible argument of undue burden justifying warrantless GPS surveillance.

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[5] Janice Peterson, *Conflicting Views on No-warrant GPS Ruling*, Daily Herald (Sept. 5, 2010, 12:25 AM), http://www.heraldextra.com/news/local/article_6d44220a-e8d1-5d0b-a072-bce72e97a835.html (last visited on Oct. 2, 2011) (quoting Utah County Sheriff Jim Tracy).

B. The facts of this case undermine any claim that the warrant requirement impairs law enforcement's ability to establish probable cause.

Like *Karo*, "this is not a particularly attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained in this case, seemingly on probable cause." *Karo*, 468 U.S. at 718. Here, FBI agents obtained a warrant authorizing covert installation and monitoring of the GPS device on respondent's car. See Pet'r's Br. at 3. And like *Karo*, this warrant was not invalidated for want of probable cause. See *Karo*, 468 U.S. at 718 n.5. We are assured by the government that these officers "had reasonable suspicion, and indeed probable cause" to support their warrant. See Pet'r's Br. at 50–51.

In essence, the constitutional issues here arise from an officer's violation of the warrant's terms as to timeliness and location. The warrant required installation in the District of Columbia within ten days. The officers, apparently untroubled by these express terms and sensing no urgency, took eleven days to install the device and did so a short distance away, in Maryland. In light of the subsequent four weeks of tracking and the known location of Mr. Jones, neither a sense of exigency nor uncertainty could have prompted the officers' decision to forego a renewed warrant.

Inconvenient facts aside, a warrant requirement poses an especially light burden where law enforcement officials foresee a need for extended GPS surveillance of a particular automobile. Indeed, because the value of the device as an investigative tool is only as it is used over a period of time, the time required to secure a warrant is surely de minimis in

comparison. Surely law enforcement in such situations can explain who the target is why the GPS device is necessary, where and when it will be installed, and for how long it will be monitored. Assuming probable cause can be demonstrated, there is simply no case for hardship given the inherent absence of urgency in such situations. The time required to install a GPS device is so minimal and the time to obtain a warrant so relatively insignificant (thanks to the technological advancements discussed above) that the warrant requirement poses no risk of significant investigative delay. Compared to the duration of anticipated surveillance, the minimal time required for Fourth Amendment compliance seems trivial indeed.

III. THERE IS NOTHING ABOUT THE NATURE OF MOTOR VEHICLES THAT JUSTIFIES A BLANKET EXCEPTION TO THE WARRANT REQUIREMENT, AND THE AUTOMOBILE EXCEPTION MANIFESTLY DOES NOT APPLY TO WARRANTLESS GPS TRACKING.

Wisely, Petitioner appears to have abandoned its reliance on the automobile exception to the warrant requirement at this stage of the litigation. Although several courts and Petitioner (in the case below) relied on a reduced expectation of privacy in automobiles to justify covert tracking without limit, plainly the exception does not apply.

The general proposition that a person has a diminished expectation of privacy in an automobile affords law enforcement reasonable leeway in the context of vehicle stops, but it is of dubious value in the context of GPS technology. The automobile exception allows law enforcement to search a vehicle without a warrant when there is a risk that the vehicle will be "quickly moved." *Carroll* v. *United*

States, 267 U.S. 132, 153 (1925); see also *California* v. *Carney*, 471 U.S. 386, 390 (1985) ("[O]ur cases have consistently recognized ready mobility as one of the principal bases of the automobile exception."). The reason for this exception is that by moving a vehicle, one can easily remove contraband, evidence, or people before police can obtain a warrant. *Carney*, 471 U.S. at 390. Absent such a risk, the exception does not apply. See *Arizona* v. *Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1723–24 (2009) (holding that a search of respondent's vehicle is unreasonable where there was no risk of him accessing the vehicle).

The utility and efficacy of the GPS device is premised on the automobile's ready mobility, without which there would be no tracking. The mobility of the vehicle does not create a risk of the loss of evidence; rather, it is the vehicle's very mobility that creates the evidence in the GPS context. A tracking device that stands still and remains in "sleep mode" would be of little investigative use. GPS devices do not fit within the automobile exception because the automobile's movement creates the evidence that the surveillance hopes to uncover, compile, and record. So the justification for the exception does not apply to GPS tracking. A vehicle's movement creates no risk of loss of evidence when it is the movement itself that is the evidence.

Furthermore, this Court has held "that a motorist's privacy interest in his vehicle [may be] less substantial than in his home [but] is nevertheless important and deserving of constitutional protection." *Gant*, 129 S. Ct. at 1720. Courts have recognized a reduced expectation of privacy in an automobile that allows law enforcement to search for contraband without a warrant, under some circumstances.

However, a reduced expectation of privacy does not mean a complete lack of privacy.

Individuals may reasonably expect they might be pulled over, given a ticket, stopped at a sobriety check point, or even just intermittently be observed by law enforcement while on public roads. However, this does not mean that they expect to be relentlessly tracked and followed around the clock for weeks on end, unwittingly creating a detailed compilation of where they have travelled, how fast, how frequently, and for how long.

Indeed, several jurisdictions have criminalized the unauthorized use of automobile GPS surveillance by private individuals thereby indicating a demonstrable aversion to surreptitious electronic tracking.[6] Furthermore, the very existence since 2006 of a federal rule of criminal procedure outlining the process for obtaining an electronic tracking warrant not only underscores a societal expectation that such monitoring will not be done in secret but also demonstrates the practical ease by which parameters can be set, monitored, and overseen by a neutral, independent arbiter. Fed. R. Crim. P. 41(e)(2)(C) (specifying warrant requirements and limitations).

The regulatory expectations society recognizes in the automobile context are grounded in safety

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[6] *See, e.g., People* v. *Sullivan*, 53 P.3d 1181 (Colo. Ct. App. 2002) (Husband using a GPS against wife found guilty of harassment by stalking); *L.A.V.H.* v. *R.J.V.H.*, 2011 WL 3477016, at *4 (N.J. Super. Ct. Aug. 10, 2011) (ex-husband's use of GPS to follow and monitor ex-wife constitutes stalking); *M.M.* v. *J.B.*, 2010 WL 1200329 (Del. Fam. Ct. Jan. 12, 2010) (father convicted of felony offense of stalking for placing GPS device on mother's vehicle); *Heil* v. *State*, 888 N.E.2d 875 (Ind. Ct. App. 2008) (husband convicted of first degree stalking for using GPS device to track his wife).

justifications—not in arbitrary or indiscriminant application. Finally, the automobile exception dispenses with the necessity of a warrant prior to the automobile search. It does not eliminate the probable cause requirement, nor does it permit a vehicle search, the sole purpose of which is to help law enforcement "gather information to establish probable cause." See, Pet'r Br. at 50.

Accordingly, the automobile exception has no place in the unlimited GPS tracking analysis.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Circuit Court of Appeals of the District of Columbia.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTOINE JONES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE* [1]

The Owner-Operator Independent Drivers Association ("OOIDA") is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional truck drivers. The 151,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

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[1] Counsel for both parties have consented to the filing of this brief, and their letters of consent are filed with this brief. No counsel for a party authored this brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Court's resolution of the Fourth Amendment questions presented in this case will have a direct and immediate impact on warrantless electronic surveillance activities currently being advocated or conducted by federal governmental agencies in a variety of regulatory settings. Contrary to Petitioner's assertion that "[n]o evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote," Pet. Br. at 14, the Federal Motor Carrier Safety Administration (FMCSA) is currently promulgating regulations that would mandate the installation of electronic onboard recorders ("EOBRs") – equipped with global positioning system ("GPS") technology[2] – for the purpose of monitoring the movements of four million (4,000,000) drivers; operating for five hundred thousand (500,000) motor carriers; using 3,637,000 vehicles, twenty four hours a day, seven days a week.[3] The government's rapidly expanding use of such warrantless and intrusive surveillance is troubling from a host of constitutional and policy perspectives. OOIDA files this amicus curiae brief because of its serious concern that the government's indiscriminate, relentless and intrusive use of warrantless surveillance devices such as EOBRs would violate the constitutional rights of drivers.

The government's attempt to mandate the installation of EOBRs raises the precise question envisioned

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[2] *See* Notice of Proposed Rules, "*Electronic On-Board Recorders for Hours-of-Service Compliance*," 76 Fed. Reg. 5537 (February 1, 2011), available at 2011 WL 290639.

[3] Electronic On-Board Recorders and Hours-of-Service Supporting Documents, *Preliminary Regulatory Evaluation*, at 6, Regulatory Docket No. FMCSA-2010-0167-0003, January 24, 2011.

by this Court in *United States v. Knotts*, 460 U.S. 276 (1983), that "if such dragnet type law enforcement practices...should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284. Regrettably, that day has now arrived. For if there are no constitutional protections against the government's warrantless monitoring of a single citizen on a virtual 24-7 basis, then there are serious questions as to whether there are any constitutional protections against the government's use of such "dragnet type law enforcement practices" against massive groups of citizens such as the 4 million truck drivers who stand to be swept up in the FMCSA's dragnet. OOIDA submits this brief in support of the Respondent because of the wide-ranging and potentially adverse implications the Court's ruling in this case may have on the constitutional rights of several million truck drivers and motor carriers, including members of OOIDA.

BACKGROUND

A. The Government's Use of Widespread, Suspicionless GPS Monitoring is Imminent.

In its brief, the government states: "No evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote." Pet. Br. at 14. Not so. The specter of such surveillance is both disturbingly "practical" and demonstrably imminent. Federal governmental agencies are currently engaged in, or seeking authority to engage in, widespread warrantless GPS surveillance of millions of American citizens.

As an initial matter, it should be noted that accurate information about the ways in which federal and state agents utilize GPS technology has not been

publically or candidly revealed by the government. *See* Pet. 24 (asserting it now "frequently use[s] tracking devices early in investigations," but with no elaboration); *ACLU v. DOJ*, —F.3d—, 2011 WL 3890837, at *2 (D.C. Cir. Sept. 6, 2011) (refusing, on privacy grounds, to release docket information about cases in which GPS data were already produced to a court).

At the other end of the spectrum, however, various governmental agencies such as the FMCSA are actively seeking to mandate installation of GPS devices on motor vehicles for the purpose of maintaining warrantless round-the-clock surveillance – precisely the sort of "extended recordation of a person's movements" which the court of appeals found unconstitutional in this case. *See United States v. Maynard*, 615 F. 3d 544, 563 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 671 (2011).

B. The FMCSA is Currently Seeking to Mandate GPS Tracking of Millions of Commercial Motor Vehicle Drivers.

The Court's decision in this case will not only affect Respondent's rights, but potentially the rights of millions of truck drivers who are the subject of a pending rule by the FMCSA to use GPS technology installed in EOBRs to monitor drivers 24 hours a day. The Court's answer to the question in this case as to whether a warrant is required before the government can attach a GPS device to a vehicle may therefore have an indelible impact on the Fourth Amendment issues which OOIDA, and the FMCSA in response, have raised in those regulatory proceedings.

The FMCSA is the agency within the United States Department of Transportation with primary respon-

sibility for the regulation of commercial motor vehicles and their operators. FMCSA regulates the number of hours during a day and during a week that a commercial motor vehicle driver can work and drive a truck. 49 C.F.R. Part 395. The "hours-of-service" ("HOS") rules require drivers to keep track of their four possible categories of "duty status:" (1) driving; (2) on-duty, not driving; (3) in the sleeper berth of the truck; and (4) off-duty. *See* 49 C.F.R. §395.8(b). The rules require drivers to use paper logbooks to record several pieces of information, including their duty status and their geographic location at each change in duty status. *See* 49 C.F.R. §395.8.

In 2010, the FMCSA published a Final Rule requiring *some* motor carriers, and permitting *all* motor carriers, to use EOBRs in lieu of paper logs to record a driver's duty status. *See* Final Rules, Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17208 (Apr. 5, 2010)("EOBR I"). In *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, __ F.3d __, 2011 WL 3802728 *2 (7th Cir. 2011), the Seventh Circuit summarized the technical capabilities of the EOBRs required by the rule as follows:

> The Agency defines an EOBR as "an electronic device that is capable of recording a driver's hours of service and duty status accurately and automatically." 49 C.F.R. § 395.2 (2011). An EOBR must be "integrally synchronized" with a truck's engine, *id.*; this allows the device to be linked simultaneously with both the engine and the driver's telephone so that contemporaneous updates can be sent either through cellular technology or via satellite to a remote server. To meet the Agency's performance requirements,

> the amount of data an adequate EOBR must be capable of recording is extensive: the truck's registration number, the date and time, the location of the truck, the distance traveled, the hours in each duty status for a 24–hour period, the motor carrier's name and Department of Transportation number, the weekly basis used by the motor carrier (either seven or eight days) to calculate cumulative driving time, and even the document numbers or name of the shipper and goods being shipped. *Id.*; 49 C.F.R. § 395.16 (2010). At a less technical level, an EOBR is essentially a device implanted into a truck that records significant amounts of data about the truck's location, how it is being used, how it has been used over time, and that uses satellite technology to allow nearly instant electronic transmission of this data to the trucker's employer (that is, the motor carrier).

Id.

The government's proposed EOBR program is thus equally intrusive, and certainly far more pervasive, than the GPS surveillance used in the case at bar. FMCSA would require that the EOBR track a driver's location with no less frequency than once every 60 minutes. *See* 49 C.F.R. § 395.16(f). FMCSA would further require that EOBRs employ satellite or ground based positioning technology, or a combination of the two. *See* 49 C.F.R. Part 395 Appendix A, 3.1.1.1 and 3.1.1.3.

Shortly after EOBR I was published, OOIDA filed a petition for review by the Seventh Circuit on the grounds, *inter alia*, that: (1) FMCSA's action was arbitrary and capricious; and (2) mandatory use of EOBR's violated the Fourth Amendment. While that petition was pending, FMCSA proposed a *new* EOBR

rule ("EOBR II") with the primary purpose of requiring *all* regulated truck drivers to install EOBRs in their trucks to monitor hours-of-service compliance. *See* 76 Fed. Reg. 5537. OOIDA has submitted extensive comments to the docket in that rulemaking at FMCSA-2010-0167-0374. A Final Rule in EOBR II is pending.

There are an estimated 4 million commercial drivers license holders who would be required to adopt and use EOBRs under the proposed EOBR II rule. In an August 30, 2011 letter from President Obama to Speaker of the U.S. House of Representatives, John Boehner, the President disclosed that the EOBR II rule would impose a burden of *$2 billion* to the public – one of the top seven most economically burdensome proposed rules.[4]

On August 26, 2011, the Seventh Circuit vacated the EOBR I Rule, holding that it was "*arbitrary and capricious*" because the FMCSA failed to comply with the mandate of Congress under 49 U.S.C. § 31137(a) to ensure that such devices are not used to harass drivers. 2011 WL 3802728 *8. Having disposed of the rule on this question, the Court declined to address the question of whether the mandated use of EOBRs violated the Fourth Amendment.

> We could say more about the other issues raised by the petitioners[...] But this area of regulation is moving quickly. We note, for example, that the FMCSA has already proposed a rule requiring EOBRs for all motor carriers, that the technology and markets are rapidly changing, and that the Agency is apparently conducting new case stu-

[4] Available at http://www.politico.com/static/PPM169_110830_boehner.html.

> dies on EOBR use. Rather than reach beyond what is strictly necessary here, prudence dictates that we leave for another day any questions that might arise in connection with whatever new rule the Agency decides to adopt.

Id. Accordingly, the same Fourth Amendment issues presented by the EOBR I rule persist in the pending EOBR II rulemaking.

The Fourth Amendment issues implicated by the FMCSA's attempt to mandate EOBRs may be shaped by the Court's ruling in this case because they share the same essential question: whether the government is required to obtain a warrant before attaching an electronic monitoring device to an individual's vehicle, and thereafter monitoring and tracking his movements on a perpetual basis. The Court's resolution of this issue will thus not only set forth a declaration regarding the Respondent's constitutional rights, but potentially the rights of millions of truck drivers governed by FMCSA's mandate – and indeed, countless millions of other individuals who may soon, or who may already be, the subjects of warrantless GPS tracking by the government.

SUMMARY OF ARGUMENT

The government's warrantless installation and usage of satellite tracking devices to continuously monitor and record the movements of citizens in their motor vehicles violates the Fourth Amendment.

I. A. Warrantless surveillance through use of GPS tracking technology is a search within the meaning of the Fourth Amendment. The driver of a motor vehicle has a "justifiable," "reasonable," and "legitimate expectation of privacy" against the government conducting warrantless surveillance through GPS track-

ing devices. *Katz v. United States*, 389 U.S. 347 (1967); *Smith v. Maryland*, 442 U.S. 735 (1979). Further, that expectation of privacy is objectively reasonable and justifiable. *Id.*

B. In *United States v. Knotts*, 460 U.S. 276 (1983), the Court held that police officers were not required to obtain a warrant before using a radio-signal beeper to track an individual on a single trip, as he travelled by "automobile on public streets and highways." However, the Court declined to address the Fourth Amendment implications of "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision," which it expressly left for another day. *Id.*, 460 U.S. at 283. This case beckons the Court to resolve the question reserved in *Knotts* as to whether the government's warrantless use of technologically sophisticated tracking devices to conduct round-the-clock surveillance of citizens violates the Fourth Amendment.

C. Federal governmental agencies are currently engaged in, or seeking authority to engage in, warrantless GPS surveillance of millions of American citizens. As one example, the FMCSA is currently promulgating regulations requiring the installation of EOBRs for the purpose of monitoring the movements of 4 million drivers – twenty four hours a day, seven days a week. This is precisely the sort of "twenty-four hour" surveillance which this Court deferred to another day in *Knotts*, but which may very well become authorized in the event this Court reverses the court of appeals' judgment in this case. This case thus presents an opportunity for the Court to resolve the question reserved in *Knotts* as to whether such surveillance is constitutional.

II. The warrantless installation of GPS tracking device on a vehicle is a seizure in violation of the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505 (1961).

III. The Government's use of GPS surveillance without a warrant is unreasonable. *Mincey v. Arizona*, 437 U.S. 385 (1978).

IV. Blanket approval of warrantless GPS surveillance would upset longstanding Fourth Amendment jurisprudence. *New York v. Burger*, 482 U.S. 691 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

ARGUMENT

I. THE GOVERNMENT'S WARRANTLESS USE OF GPS SURVEILLANCE TO MONITOR AND RECORD THE MOVEMENTS OF CITIZENS VIOLATES THE FOURTH AMENDMENT.

A. General Fourth Amendment Protections.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...." U.S. CONST. amend. IV. Whether Government action constitutes a search depends upon whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). In *Katz v. United States*, 389 U.S. 347 (1967), the Court set forth a two part standard for when a Fourth Amendment search has occurred: (1) the

individual has "manifested a subjective expectation of privacy" in the thing searched; and (2) "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). The first element addresses whether the individual's conduct has "exhibited an actual (subjective) expectation of privacy ... [which is demonstrated by] whether ... the individual has shown that he seeks to preserve something as private." *Knotts*, 460 U.S. 276, 281 (1981) (internal citations and quotation marks omitted). The second element looks to whether the "individual's expectation, viewed objectively, is justifiable under the circumstance." *Id.* (internal citations and punctuation omitted).

It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967). "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-614 (1989).

B. Governmental GPS Tracking and Recording of Persons in Their Motor Vehicles Constitutes a Search.

In *Knotts*, the Court held that short term use of a simple beeper device to track the movement by truck of a five gallon drum of chloroform used in drug manufacture from its place of purchase to its place of use was not a search. Police officers supplemented their visual observations of the truck's movement with tracking signals from the beeper device. 460

U.S. at 278-79. The record did not disclose any use of the beeper after the truck reached its final destination. *Id.* at 284-85. The Court's holding, relying on the "limited use which the government made of the signals," was appropriately narrow:

> Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Id. at 284.

Knotts explicitly left unresolved the question of whether electronic surveillance of movements in public for an extended period can constitute a search, stating:

> Respondent ... expresses the general view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen ... without judicial knowledge or supervision will be possible, without judicial knowledge or supervision." * * *; if such dragnet type enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.

Id. at 283-84.

One year later, in *United States v. Karo*, 468 U.S. 705 (1984), the Court considered "whether the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." *Id.* 468 U.S. 713–18. There, the Court held that use of an elec-

tronic tracking device *does* constitute a Fourth Amendment search if the tracking device enables the Government to "obtain information that it could not have obtained by observation from outside the curtilage of the house." *Id.* at 715. Notably, the Court observed: "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *Id.* at 712.

In *Kyllo v. United States*, 533 U.S. 27 (2001), the Court examined the use of a sensing device that was employed to detect heat from electric lamps used to promote the indoor cultivation of marijuana in a residence to determine "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." 533 U.S. at 34. The Court distinguished technology that merely supplemented sensory observations of the kind implicated in *Knotts* (visual observation of a vehicle) with technology that provided information regarding the interior of a home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area ...." *Id.* "Technology that does more than merely supplementing sensory observations constitutes a search at least where ... the technology in question is not in a general public use." *Id.* Such a search is presumptively unreasonable without a warrant. *Id.* at 40. Importantly, the Court observed that advances in "police technology [can] erode the privacy guaranteed by the Fourth Amendment," *id.* at 34, and that "we must take the long view, from the original meaning of the Fourth Amendment forward." *Id.* at 40.

The sophistication of GPS devices such as EOBRs presents a very different surveillance technology than that used in *Knotts*. The beeper used in *Knotts* was a simple tool that was approved because it

provided only a modest sensory-enhancement to real-time visual surveillance. *Id.*, 460 U.S. at 277. Beepers could neither determine location nor store location data. By contrast, a GPS device such an EOBR does not enhance human senses – it replaces them with remote collection and storage of data reflecting time, location, movement and speed.[5]

Further, the use of GPS tracking equipment operating 24 hours a day, seven days a week over prolonged periods of time and covering potentially millions of trucks and drivers presents precisely the "dragnet type law enforcement practices" that this Court reserved for a later day in *Knotts*. 460 U.S. at 284.

In this case, the court of appeals addressed the question left unresolved by *Knotts* – "whether different constitutional principles may be applicable" where the government has engaged in "twenty-four hour surveillance of any citizen ... without judicial knowledge or supervision." *Maynard*, 615 F.3d at 558. In September 2005, the Government attached a GPS tracking device to Respondent's vehicle without a warrant and tracked his movements in the vehicle

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[5] *See* Lenese Herbert, "Challenging the (Un)Constitutionality of Governmental GPS Surveillance," 26 CRIMINAL JUSTICE 34, 35 (Summer 2011):

> Once a GPS receiver is outfitted with a transmitter or recording device, third parties interested in determining the whereabouts of the GPS device may remotely and unblinkingly surveil its location continually v tually anywhere on the globe. Quantitatively and qualitatively, then, GPS-enabled surveillance is far cheaper and vastly superior to visual surveillance, as no one human or organization of human observers is currently capable of such comprehensive, continuous, and accurate information regarding location and movement monitoring.

continuously for four weeks. *Id.* at 555. The court of appeals held that this prolonged electronic surveillance of an individual's location constituted a Fourth Amendment search. *Id.* at 555–68. The court noted two important distinctions between the short-term surveillance in *Knotts* and the prolonged surveillance at issue here. First, the court concluded that while the individual in *Knotts* did not have a reasonable expectation of privacy over his location while traveling from one place to another, the Respondent here had a reasonable expectation of privacy over the *totality* of his movements over the course of a month. *Id.* The court reasoned that the totality of one's movements over an extended time period is not actually exposed to the public "because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil." *Id.* at 560. Second, the court concluded that people have an objectively reasonable expectation of privacy in the totality of their movements over an extended period because an individual's privacy interests in the totality of his movements far exceeds any privacy interest in a single public trip from one place to another.

> The whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more....

> ... Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation.

Id. at 561–62. Finally, the court concluded that society recognizes an individual's "expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation." *Id.* at 563. *Accord United States v. Moore*, 562 F.2d 106, 110 (1st Cir.1977) ("[c]itizens have a reasonable expectation of privacy in their movements, and that the possibility of being followed about in public by governmental agents does not mean that they anticipate that their every movement will be continuously monitored by a secret transmitter"). *But cf. United States v. Pineda–Moreno*, 591 F.3d 1212 (9th Cir.2010) (holding that GPS tracking of defendant's car did not invade defendant's reasonable expectation of privacy and did not constitute a Fourth Amendment search because it revealed only information the agents could have obtained by physically following the car). Although the Ninth Circuit denied rehearing *en banc* in *Pineda–Moreno*, five judges dissented from the denial by published opinion. *United States v. Pineda–Moreno, reh'g en banc denied*, 617 F.3d 1120 (9th Cir.2010). In the lead dissent, Chief Judge Alex Kozinski argued that GPS tracking is much more invasive than the use of beepers discussed in *Knotts*, which merely augmented visual surveillance actually being conducted by the police; the combination of GPS tracking with other technologies in common use by law enforcement

amounts to a virtual dragnet in dire need of regulation by the courts; and such "creepy and un-American" behavior should be checked by the Fourth Amendment. *Id.* at 1126 (Kozinski, C.J., dissenting from the denial of *reh'g en banc*).

C. Reversal of the Court of Appeals Would Have the Inevitable Effect of Sanctioning Widespread Warrantless GPS Surveillance.

The court of appeals' decision carefully balances the Fourth Amendment implications in cases involving the comparatively primitive type of surveillance at issue in *Knotts*, with the dramatically different, sophisticated and intrusive surveillance now enabled by GPS technology. Ongoing efforts by federal governmental agencies like the FMCSA to mandate installation of GPS tracking systems such as EOBRs illustrate the domino effect that likely could result from a ruling by this Court authorizing warrantless GPS surveillance.

Under *Knotts*, it is understood that a truck traveling over public highways can generally be observed by others and, under many circumstances, the driver would have no reasonable expectation of privacy. But circumstances change when a vehicle is exposed to continuous surveillance over a long period of time. The court of appeals' analysis of the privacy implications of prolonged GPS tracking is instructive in distinguishing such long-term surveillance from the comparatively rudimentary surveillance presented in *Knotts*:

> Applying the foregoing analysis to the present facts, we hold the whole of a person's movements over the course of a month is not actually

> exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

615 F.3d at 560. The court of appeals went on to recognize that the prolonged monitoring of Respondent through GPS surveillance violated his reasonable expectation of privacy:

> Society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have-short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts;* indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under [*Katz v. United States*, 389 U.S. 347 (1967)].

Id. 615 F.3d at 563 (citations omitted).[6]

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[6] *See also* Renee McDonald Hutchins, "Tied up in Knotts. GPS Technology and the Fourth Amendment," 55 UCLA L. REV. 409, 415-17 (2007):

These precepts become all the more acute when considering that the government is now actively seeking to monitor the movements of millions of motor vehicles on a 24/7 basis with GPS devices. Federal judges on both sides of the divide regarding the constitutionality of limited GPS surveillance have *all* expressed caution over the dangers inherent in unbounded electronic surveillance. For example, in *United States v. Cuevas-Perez*, 640 F. 3d 272, 275 (7th Cir. 2011), the majority opinion acknowledged:

> The use of GPS by law enforcement is a Fourth Amendment frontier. Undoubtedly, future cases in the tradition of *Maynard* will attempt to delineate the boundaries of the permissible use of this technology – a technology surely capable of abuses fit for a dystopian novel.

Id. In her dissenting opinion in *Cuevas-Perez*, Judge Wood stated:

> This case presents a critically important question about the government's ability constantly to monitor a person's movements, on and off the public streets, for an open-ended period of time.

Without doubt, this is not the vision of free society sanctioned by the framers. Anthony Amsterdam observed that "the authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit." GPS-enabled technology, when used with wireless transmitters and monitored by the police, fundamentally alters this expectation of privacy in ways that are not reasonable under our constitutional system. The Fourth Amendment mounts a defense against such an erosion of a free society. And for this reason, the use of GPS-enhanced technology cannot be countenanced without judicial oversight.

> The technological devices available for such monitoring have rapidly attained a degree of accuracy that would have been unimaginable to an earlier generation. They make the system that George Orwell depicted in his famous novel, *1984*, seem clumsy and easily avoidable by comparison.

Id. at 286.

In view of these uniform concerns it may no longer be satisfactory to say that there will be "time enough to determine" whether government should be free to engage in pervasive, indiscriminate, and intrusive GPS surveillance without a warrant. The Government is instituting such programs *now* – to wit – the FMCSA's efforts to mandate surveillance of millions of truck drivers through EOBRs. To be sure, the danger posed by the Court's deferral of these questions until a later day are best illustrated by Judge Sentelle's dissent from the court of appeals' order denying the petition for rehearing en banc in this case as follows:

> The reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero. The sum of an infinite number of zero-value parts is also zero.

United States v. Jones, 625 F. 3d 766, 769 (D.C. Cir. 2010)(Sentelle, J. dissenting). If the foregoing sentiment were adopted by this Court, either explicitly or implicitly, the government would potentially be free to engage in warrantless dragnet surveillance on *every* citizen without *any* restrictions whatsoever. Put another way, if this Court rules that there is "zero" protection for any *one* individual against prolonged warrantless GPS surveillance then, by extension of

such reasoning, there is "zero" protection for *everyone*. Even those who have endorsed limited use of GPS surveillance have cautioned against such an extraordinary deconstruction of Fourth Amendment protections. *See United States v. Garcia*, 474 F. 3d 994, 998-99 (7th Cir. 2007)(Posner, J.) ("It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment ....").

The Court's ruling in this case should be informed by its earlier admonition in *Karo* that: "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." 468 U.S. at 712. Similarly, in *Kyllo*, the Court cautioned that advances in "police technology [can] erode the privacy guaranteed by the Fourth Amendment," 530 U.S. at 34, and that "we must take the long view, from the original meaning of the Fourth Amendment forward." *Id.* at 40. So it is here. The Court should reject the extraordinary proposition advanced by the government that there is "zero" Fourth Amendment protection against warrantless and unbridled "Big Brother" satellite surveillance.

II. THE GOVERNMENT'S INSTALLATION OF, AND SURVEILLANCE THROUGH, GPS DEVICES CONSTITUTES A SEIZURE.

This Court has stated that the Fourth Amendment "protects property as well as privacy." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). In this case, the police not only engaged in surveillance by GPS but also intruded on the Respondent's personal property, namely his car, to install the GPS device on the vehicle. Because of that physical intrusion to install the GPS device, this case raises an issue that was not

presented in *Knotts*. The defendant in *Knotts* did not own the property in which the beeper was installed and thus did not have standing to raise any Fourth Amendment challenge to the installation of the beeper. But Justice Brennan's concurring opinion in *Knotts* foresaw the Fourth Amendment issue posed by the police's installing such a device: "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." 460 U.S. at 286.

In *Silverman v. United States*, 365 U.S. 505 (1961) the Court concluded that installation of a listening device on the defendants' property (by accessing a heating duct in a shared wall of the defendants' row house) was subject to the Fourth Amendment. The Court reasoned that the Fourth Amendment applied because of the police's physical contact with the defendants' property, which the Court variously characterized as: "unauthorized physical penetration into the premises," "unauthorized physical encroachment within a constitutionally protected area," "usurping part of the petitioners' house or office," "actual intrusion into a constitutionally protected area," and "physically entrench[ing] into a man's office or home." *Id.* at 509–12. The Court further determined that a physical encroachment on such an area triggered Fourth Amendment protection regardless of the precise details of state or local trespass law. *Id.* at 511.

In Judge Kavanaugh's separate dissenting opinion from the court of appeals' denial of the petition for rehearing en banc below, he correctly observed:

> If *Silverman* is still good law, and I see no indication that it is not, then *Silverman* may be relevant to the defendant's alternative argument concerning the police's installation of the GPS device. Cars are "effects" under the text of the Fourth Amendment, *see United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), and are thus "constitutionally protected areas" for purposes of *Silverman*.
>
> The key *Silverman*-based question, therefore, is whether the police's installation of a GPS device on one's car is an "unauthorized physical encroachment within a constitutionally protected area" in the same way as installation of a listening device on a heating duct in a shared wall of a row house. *Silverman*, 365 U.S. at 510, 81 S.Ct. 679. One circuit judge has concluded that the Fourth Amendment does apply to installation of a GPS device: Absent the police's compliance with Fourth Amendment requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir.1999) (Kleinfeld, J., concurring).

625 F. 3d 766, 770.

Turning these considerations to the FMCSA's efforts to mandate installation of EOBRs in commercial motor vehicles, one can more practically appreciate the property concerns implicated. For many truckers, their truck is not simply a vehicle – it is also an office, and indeed, a home away from home. In this instance, the FMCSA seeks – *by governmental mandate* – to compel millions of truck owners to surrender their property to the government for the installation of robotic satellite technology so that the

government can spy on them 24 hours a day, 7 days a week. Adding insult to that constitutional injury, the government seeks to require truck owners *to pay for the EOBRs*! In sum, it is difficult to fathom a more overreaching physical encroachment on a citizen's property than mandating installation of GPS devices in millions of privately owned trucks, effectively requiring their owners to allow the government to invade their property and compel them to put a governmental android into the passenger seat.

III. WARRANTLESS GPS SURVEILLANCE IS UNREASONABLE.

The Fourth Amendment requires that searches normally be performed pursuant to a search warrant issued in compliance with the warrant clause. *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979).

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (footnotes omitted).

Mincey v. Arizona, 437 U.S. 385, 390 (1978). Thus, although a few "jealously and carefully drawn" exceptions exist, in the ordinary case a search of private property must be reasonable and must be made pursuant to a search warrant based on probable cause. *Sanders*, 442 U.S. at 758.

The court of appeals' conclusion that the warrantless surveillance of respondent was neither reason-

able, nor excused by any exception, was undoubtedly correct:

> Here, because the police installed the GPS device on Jones's vehicle without a valid warrant, the Government argues the resulting search can be upheld as a reasonable application of the automobile exception to the warrant requirement. Under that exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996).
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> * * *
>
> [T]he automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate. *See Delaware v. Prouse*, 440 U.S. 648, 662–63, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered his automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed").

615 F.3d at 566-67.

IV. BLANKET APPROVAL OF WARRANTLESS GPS SURVEILLANCE WOULD UPSET LONGSTANDING FOURTH AMENDMENT JURISPRUDENCE.

The Court should reject any notion that warrantless GPS surveillance is permissible under one or

more of the limited exceptions to the warrant clause of the Fourth Amendment. The Court should also take great care in jealously guarding the jurisprudence governing those exceptions, *Sanders*, 442 U.S. at 758, to ensure that they are not implicitly undermined by a ruling which could be construed as allowing the government to engage in indiscriminate and relentless satellite surveillance without satisfying *any* standards established under the following Fourth Amendment jurisprudence.

A. Pervasively Regulated Industry Jurisprudence.

In the EOBR I litigation, the government took the position that the use of GPS surveillance to monitor and enforce driver compliance with hours-of-service regulations met the requirements for a warrantless search under the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. Brief of Respondent at 48-52, *Owner-Operator Independent Drivers Ass'n, Inc., et al. v. United States Dept. of Transportation, et al.*, No 10-2340 (7th Cir. Dec. 6, 2010). Where an individual elects to participate in a pervasively regulated business his "justifiable expectations of privacy" are necessarily diminished. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). In such cases, reasonably defined inspection schemes accompanied by appropriate standards for implementation pose only limited threats to those limited expectations of privacy. *Id.* Later, in *New York v. Burger*, the Court reaffirmed the principles articulated in *Donovan*, noting that the privacy expectations of individuals are lower in "commercial premises" than in a home or other location. The Court concluded that where: (1) the business in question is closely regulated, and, (2) the warrantless

inspections are necessary to further the regulatory scheme – compliance with the Fourth Amendment turns on whether the inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 702-703 (1987). Further, the regulatory program must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. *Id.* at 703.

Assuming for the purposes of this analysis that the government's position in EOBR I is correct,[7] a ruling by this Court authorizing warrantless GPS surveillance on millions of truckers – and potentially every citizen in America – would be the undoing of the safeguards afforded by *Burger*. Such a ruling would surely be invoked by law enforcement and regulatory agencies to search persons and/or premises: (1) without the need for a regulation that provides for

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[7] In EOBR I, the Seventh Circuit never reached the merits of the question of whether the use of a GPS device installed in a truck constituted a search of a *person* rather than a business *premises*. If so, it would be outside of the parameters of the *Burger* exception. 2011 WL 3802728 *8. *Burger* specifically noted that the statute authorizing the inspection "must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his *property* will be subject to periodic inspections undertaken for specific purposes.'" *Id.* at 703, quoting *Donovan*, 452 U.S. at 600 (emphasis added). In *Whren v. United States* Justice Scalia observed that *Burger* upheld the constitutionality of a warrantless administrative inspection defined as "the inspection of *business premises* conducted by authorities responsible for enforcing a pervasive regulatory scheme ...." *Whren v. United States*, 517 U.S. 806, 811 n 2 (1996). (emphasis added).

the certainty or regularity of its application; (2) without notice to any individual that a search is being conducted; (3) without a defined scope, and (4) without limiting the discretion of the inspecting officers. OOIDA is concerned that without such constraints, law enforcement personnel will assert themselves into the private lives and affairs of drivers, beyond those purposes established in the EOBR II rule.

B. Special Needs Jurisprudence.

This Court has held that searches conducted pursuant to administrative regulations are constitutional absent a search warrant, probable cause, or individualized suspicion if there is a "special need" for such a search and if the search is for a purpose distinguishable from ordinary enforcement purposes. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

The "special needs" exception is based upon a balance of the governmental interest, the expectation of privacy, and the nature of the intrusion. *Green v. Berge*, 354 F.3d 675, 677-78 (7th Cir. 2004)(citing *Skinner*, 489 U.S. 602). However, this Court has refused to allow the identification of "special needs" as a pretext for warrantless searches for law enforcement purposes. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The government must identify some generalized purpose which justifies dispensing with the "individualized suspicion" usually required for a search. *Id.* at 41. That interest cannot be simply "crime control." *Id.* at 42; *City of Indianapolis*, 531 U.S. 32, 44.

Should the Court rule in this case that a warrant is unnecessary to conduct GPS surveillance of individuals in motor vehicles, it would effectively overrule the Court's prohibition on the use of warrantless searches and seizures for the ordinary needs of law enforcement. In the case of EOBRs, it is undisputed that FMCSA tailored the provisions of the EOBR rule for the purposes of helping law enforcement to enforce the hours-of-service rule. In the Notice of Proposed Rulemaking, the Agency states: "To assist in the enforcement of the HOS regulations generally, and thus improve driver safety and welfare, FMCSA proposes to require EOBR use by motor carriers..." In attempting to balance the private burdens and public interest in the Final Rule, the Agency acknowledges law enforcement as the governmental interest in the rule:

> No commenter has provided information demonstrating competitive harm-a showing mandated by FOIA-would occur from disclosure of EOBR data as proposed in the NPRM. In the absence of such a showing, the Agency has determined today's final rule, in conjunction with existing legal authorities, properly balances the need to safeguard proprietary information against the need to enforce safety statutes and regulations.

Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17208-01, 17221-2.

Under federal law, drivers who violate the federal motor carrier safety rules are liable for civil administrative fines, *see* 49 U.S.C. § 521(b)(2), and criminal sanctions up to $25,000 and imprisonment of not more than one year. *See* 49 U.S.C § 521(b)(6) and 49 U.S.C. § 526. But, "the individual states are the primary enforcers of the highway safety regulations at

roadside inspection." *National Tank Truck Carriers v. Federal Highway Administration*, 170 F.3d 203, 205 (D.C. Cir.1999). As the primary enforcers of federal motor carrier safety rules, and therefore the primary governmental users of EOBRs, states also impose sanctions, including criminal penalties, for violations of the hours-of-service rules.[8]

Notably, FMCSA's only stated purpose of the mandated use of EOBRs is to "increase compliance" with HOS requirements. The corollary to that purpose is to enforce compliance by sanctioning the issuance of civil and criminal and violations. The Final Rule in EOBR I and the proposed rule in EOBR II mandate that EOBRs have specific technical features so that local, state, and federal law enforcement officials may access and use EOBR data to discern violations of the hours-of-service rules and to impose civil and criminal sanctions directly against drivers who commit those violations. This regulatory scheme embraces no particularized suspicion that a crime has been committed. EOBRs do not fit into the

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[8] *See e.g.*, Illinois statutes: 625 ILCS 5/18b-105 (adopting the federal hours-of-service Rules) and 625 ILCS 5/18b-107 and 625 ILCS 5/18b-108 (providing civil and criminal penalties for violation of the hours-of-service rules, among others); Indiana statutes IC 8-2.1-24-18 (adopting the federal hours-of-service rules, among others) & 8-2.1-24-24 Violation, 8-2.1-24-26 Civil penalty, and 34-28-5-4 Maximum judgments; and Wisconsin statutes: Wis. Adm. Code s Trans 325.02 (order of the Secretary of Transportation adopting the federal HOS rules, among others), W.S.A. 194.37 (giving the Dept. of Transportation authority to enforce its orders) W.S.A. 194.11(allowing agents of the department to stop commercial motor vehicles to enforce the rules), and W.S.A. 194.17 (providing penalties for violations of orders of the Secretary). Every state imposes such penalties as a participant in the Motor Carrier Safety Assistance Program. 49 C.F.R. Part 350.

special needs exception. But if the Court rules in this case that a warrant is not necessary to use GPS devices for law enforcement purposes, then the Government will no longer need to establish a special needs exception in order to use such devices, and will be liberated to use them to meet the "ordinary needs" of law enforcement. The Court should carefully guard against the dilution of this standard in crafting its ruling in this case.

CONCLUSION

For these reasons, and those set forth in the Respondent's brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 10-1259

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
ANTOINE JONES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AND THE NATIONAL MOTORISTS ASSOCIATION *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the warrantless use of a GPS tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment.

2. Whether the government violated respondent's Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent.

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INTEREST OF *AMICI*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because a decision adverse to the respondent will threatens the fundamental rights of all citizens to privacy at a time when advances in surveillance technology raise a real danger of the creation of a police state.

The National Motorists Association (NMA) is a membership-based organization founded in 1982 to protect and uphold the rights of the driving public. Association members, located in all 50 states and the District of Columbia, are keenly interested in maintaining safe and responsible highway travel. That includes advocating for fair traffic laws and proper law enforcement actions that uphold the fundamental tenets of the US Constitution. One of the most important rights afforded to all US citizens, and one that is vital for the nation's motorists, is the Fourth Amendment protection against illegal search

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

and seizure. The use of modern surveillance technology by law enforcement is testing the boundaries of that protection. The current news that General Motors has been using its OnStar monitoring system to continue mining data from unsuspecting former customers is an indication of how, without checks and balances, technology can be used to undermine basic privacy rights. When law enforcement is involved, as with *United States v. Antoine Jones*, proper oversight must be maintained by the judiciary. Motorists must be afforded all the protection of the US Constitution against unwarranted monitoring and data collection.

SUMMARY OF THE ARGUMENT

At stake in this case is nothing less than the continued vitality of the Fourth Amendment in this modern technological age. This case presents an opportunity for the Court to clarify the implications of the Fourth Amendment in the current landscape of surveillance technology—technology that can uncover nearly every detail of an individual's intimate life. While this technology can serve a useful purpose in apprehending criminals, the essence of the Fourth Amendment dictates that law enforcement officials not be permitted free reign to conduct high-tech surveillance absent judicial oversight through the warranting process. It is imperative that the Court recognize this case as an example of the widespread and growing use of surveillance technology by government officials, and that the Court provide meaningful direction to lower

courts in applying the Fourth Amendment in this modern environment.

This case also allows the Court to expound on its prior statements to the effect that even in public places, citizens have certain reasonable expectations of privacy that are transgressed by secretive, all-encompassing government monitoring. Refusing to impose proper Fourth Amendment limits on Global Positioning System ("GPS") monitoring and other methods of technological surveillance would grant police unacceptable levels of discretion and enable the development of an authoritarian surveillance state.

Such a state would not only result in the destruction of the last vestiges of citizens' privacy, but would also have a serious chilling effect on the fundamental freedoms of speech, religious exercise, and association. With no end in sight for the realization of heretofore unimaginable surveillance capabilities, this Court must fulfill its duty to establish meaningful limits on the use of these capabilities by police so as to ensure the continued efficacy of the Fourth Amendment in this digital age, and to preclude a subtle erosion of other liberties guaranteed to American citizens by the Bill of Rights. Requiring police to obtain a search warrant for the use of GPS and similar technology to monitor citizens is essential if the Court is to ensure meaningful protection of these liberties.

Thus, while the warrantless installation and employment of a GPS device to track Jones' movements surely violated his Fourth Amendment right to be free from unreasonable searches and

seizures, the importance of this case transcends the immediate controversy presented.

ARGUMENT

I. The Court Must Delineate Proper Constitutional Limitations on the Use of Surveillance Technology

A. The Court's Application of Fourth Amendment Principles Must Account For the Evolving Nature of Threats to Privacy Posed by Evolving Technology

The advent of radically advanced citizen-monitoring capabilities requires this Court to articulate an interpretation of the Fourth Amendment's protections that facilitates its application in technologically sophisticated contexts. The state's arsenal of surveillance technologies now includes a multitude of devices, described in detail below, which enable it to comprehensively monitor an individual's private life without necessarily introducing the type of physical intrusion into his person or property covered by this Court's well-established Fourth Amendment jurisprudence.

A failure to address the privacy ramifications of these new technologies, thereby permitting nearly limitless government surveillance of the intimate details of citizens' everyday lives, would have disastrous consequences for the nation. As Justice Robert Jackson, chief U.S. prosecutor at the Nuremberg Trials, argued, "Uncontrolled search and

seizure is one of the first and most effective weapons in the arsenal of every arbitrary government...Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

Allowing law enforcement to acquire evidence without a warrant by employing advanced technologies opens the door to ceaseless, suspicionless surveillance of innocent Americans with no checks or oversight. Judicial deference to law enforcement in the instant case would be dangerous, rendering the Fourth Amendment effectively obsolete in a wide range of modern-day circumstances. If the Court were to uphold the search at issue, it is difficult to discern any limiting principles to preclude the government from requiring GPS installations on every newly-manufactured car or from amassing enormous databases detailing the intimate lives and habits of every citizen, without judicial oversight or checks of any kind. This case requires the Court to draw a line in the sand, clearly delineating the boundaries of permissible surveillance and reestablishing the Fourth Amendment as a meaningful bar to an increasingly authoritarian national security state.

A brief look at the various technologies that are now available to law enforcement highlights the need for a modern delineation of proper Fourth Amendment boundaries for government surveillance.

1. GPS Tracking

As evidenced by this case, GPS is an increasingly formidable tool in the government's surveillance arsenal. GPS technology involves a tangled fusion of state and private interests. While the Department of Defense is responsible for operating the GPS system, the program receives oversight and guidance through the National Executive Committee for Space-Based Positioning, Navigation, and Timing (PNT)—a joint civil/military body established by presidential directive.[2] The National Executive Committee is chaired jointly by the Deputy Secretaries of Defense and Transportation.[3] The 24 satellites utilized to enable GPS technology were manufactured by third party defense contractors, such as Lockheed Martin, and are owned and operated by the United States Department of Defense.[4] The government allows third-party manufacturers, such as Tom-Tom and Garmin, to make hand-held GPS devices for civilian use in cars.[5] Each GPS-capable device has its own individualized computer chip from the third party manufacturing company that can be used to identify the whereabouts of an individual customer. Individuals using GPS technology cannot

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[2] *The U.S. Government Manages GPS as a National Asset*, Federal Agencies, http://www.gps.gov/policy/agencies (last visited Aug. 5, 2011).

[3] *Id.*

[4] *Lockheed Martin GPS II Team Completes Key Flight Software Milestone*, http://www.lockheedmartin.com/products/GPS (last visited Aug. 5, 2011).

[5] *What is GPS?* Garmin, http://www8.garmin.com/aboutGPS/ (last visited Aug. 30, 2011).

independently protect themselves from spying, as the use of GPS jamming equipment violates federal law.[6]

2. Drones

The government utilizes unmanned aerial vehicles (UAVs) for covert surveillance. UAVs have been successfully employed in military contexts since World War II.[7] Modern-day drones are often piloted remotely, and can be used to produce real-time images.[8] Government programs continue to make drones increasingly discreet and effective. Both the Central Intelligence Agency (CIA), and the Defense Advanced Research Projects Agency (DARPA) have experimented with robotic insects equipped with cameras or microphones.[9] The Air Force's newest UAV model uses panoramic cameras to supply military personnel with images spanning an entire

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[6] *Information About GPS Jamming*, Federal Agencies, http://www.gps.gov/policy/interference/jamming (last visited Aug. 5, 2011) (Use violates 27 U.S.C. § 333 and 47 U.S.C. § 301).

[7] *Spies that Fly: Timeline of UAVs*, PBS (Nov. 2002), http://www.pbs.org/wgbh/nova/spiesfly/uavs.html (last visited Aug. 5, 2011).

[8] Phil Stewart, *U.S. Looks to Export Drone Technology to Allies*, Reuters (Mar. 25, 2010), http://www.reuters.com/article/2010/03/25/us-usa-drones-idUSTRE62O5RW20100325. (last visited Aug. 5, 2011).

[9] Rick Weiss, *Dragonfly or Insect Spy? Scientists Work on Robobugs*, Washington Post (Oct. 9, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/08/AR2007100801434.html (last visited Aug. 29, 2011).

city.[10] According to one official, the advantage of this model is that "there is no way for the adversary to know what we're looking at, and we can see everything."[11]

Such tools are helpful in the military context in which UAVs have traditionally been used. However, an increasing number of UAV test sites and training facilities on U.S. soil are part of a push to build a UAV infrastructure for flying missions throughout the United States.[12] UAVs are now routinely used in United States border patrols.[13] Currently, two drones are operated out of Grand Forks, North Dakota; one out of Corpus Christi, Texas; and another out of Cocoa Beach, Florida.[14]

[10] Ellen Nakashima and Craig Whitlock, *With Air Force's Gorgon Drone 'We Can See Everything'*, The Washington Post (Jan 2, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/01/AR2011010102690.html?sid=ST2011012204147 (last visited Aug. 29, 2011).

[11] *Id.*

[12] Richard Wheeler, *Drones Set to Invade National Parks*, Wired Magazine (Feb. 28, 2011), http://www.wired.com/dangerroom/2011/02/drones-set-to-invade-u-s-national-parks/ (last visited Aug. 5, 2011).

[13] Department of Homeland Security *Unmanned Aerial Vehicles Operating in Arizona to Support Border Security*, Department of Homeland Security (June 25, 2004), http://www.dhs.gov/xnews/releases/press_release_0447.shtm (last visited Aug. 5, 2011).

[14] Brian Bennett, *Predator Drones do Domestic Duty*, latimes.com (Sept. 12, 2011), http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20110912,0,3833424.story (last visited Sept. 28, 2011).

The agency plans to add three more domestic drones by the end of this year.[15]

Increasingly worrisome is the use of military surveillance drones in local law enforcement.[16] The precision with which drones can detect intimate activity is remarkable. For instance, a drone can tell whether a hiker eight miles away is carrying a backpack.[17] Law enforcement officials promise to use drones to locate missing children and hunt illegal marijuana plants, but under many states' proposed rules, they could also be used to track citizens and closely monitor them based on the mere suspicions of law enforcement officers.[18]

3. Surveillance Cameras

Surveillance cameras are an ever-growing presence in American cities.[19] Though the use of surveillance cameras may be benign at first, they can ultimately be used to threaten privacy and liberty interests.

Hundreds of wireless digital cameras are being used by police in many major American cities,

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[15] *Id.*

[16] Larry Copeland, *Police Turn to Drones for Domestic Surveillance*, U.S.A. Today (Jan. 14, 2011), http://www.usatoday.com/tech/news/surveillance/2011-01-13-drones_N.htm (last visited Aug. 5, 2011).

[17] Bennett, *supra*.

[18] Copeland, *supra*.

[19] See Martha T. Moore, *Cities Opening More Video Surveillance Eyes*, USA Today (July 18, 2005), http://www.usatoday.com/news/nation/2005-07-17-cameras-cities_x.htm (last visited Sept. 13, 2011).

such as New Orleans, Baltimore, and Chicago.[20] A member of the surveillance camera industry states that, "pretty soon, security cameras will be like smoke detectors: They'll be everywhere."[21] The Department of Homeland Security has given hundreds of millions of dollars to cities for surveillance purposes, much of which was spent on surveillance cameras.[22] The cameras are installed on office buildings, banks, stores, and private establishments. While the cameras have the potential to be an effective tool in preventing crimes and capturing criminals, they can also lead to suspicionless monitoring of innocent individuals that may chill the exercise of First Amendment rights. For example, the New York Police Department has adopted the practice of videotaping individuals engaged in lawful public demonstrations.[23]

The government also uses traffic cameras as a form of visual surveillance. These cameras were designed to identify individuals who speed through the red light phase of traffic signals. The cameras are connected to the traffic signal and to sensors that monitor traffic flow just before the crosswalk or stop line. The system continuously monitors the traffic signal and the camera photographs any vehicle that doesn't stop during the red phase, generally

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] ***Who's Watching?*** *Video Camera Surveillance in New York City and the Need for Public Oversight*, New York Civil Liberties Union (Fall 2006), at 8, http://www.nyclu.org/pdfs/surveillance_cams_report_121306.pdf (last visited Sept. 28, 2011).

recording the date and time and magnifying the images of the license plate and the motorist's face.[24]

These traffic cameras are no longer used exclusively to enforce traffic laws; they are also employed for tracking individuals as they move about a city. In some areas, a network of traffic cameras provides a comprehensive view of the streets. In 2009, Chicago had 1500 cameras set up throughout the city and actively used them to track persons of interest.[25]

4. Smart Dust

Smart dust devices are tiny wireless microelectromechanical sensors (MEMS) that can detect light and movement.[26] These "motes" could eventually be as tiny as a grain of sand, but will still be capable of gathering massive amounts of data, running computations and communicating that information using two-way band radio between

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[24] *Q&A: Red Light Cameras*. Insurance Institute for Highway Safety (June 2011), http://www.iihs.org/research/qanda/rlr.html (last visited Aug. 5, 2011).

[25] William M. Bulkeley, *Chicago's Camera Network Is Everywhere*, The Wall Street Journal (Nov. 17, 2009), http://online.wsj.com/article/SB10001424052748704538404574539910412824756.html (last visited Aug. 5, 2011).

[26] Thomas Hoffman, *Smart Dust*, Computerworld (Mar. 24, 2003, 12:00 PM), http://www.computerworld.com/s/article/79572/Smart_Dust (last visited Aug. 5, 2011).

motes as far as 1,000 feet away.[27] While currently at a design impasse due to the limitations of existing technology, the goal for researchers is to reduce these chips from their current size of 5 mm to a size of 1 mm per side.[28] In the near future law enforcement officials will be able to use these tiny devices to maintain covert surveillance operations on unsuspecting citizens.

5. Radio Frequency Identification

Another type of computer chip that the government utilizes is Radio Frequency Identification (RFID). RFIDs have the ability to contain or transmit information wirelessly using radio waves.[29] These devices can be as small as a grain of rice and can be attached to virtually anything, from a piece of clothing to a vehicle.[30] If manufacturers and other distributors of clothing, personal electronics, and other items begin to tag their products with RFID, any law enforcement officer armed with an RFID reader could covertly search an individual without his or her knowledge.[31]

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[27] *Id.*

[28] *Id.*

[29] *What is RFID?*, RFID Journal, http://www.rfidjournal.com/article/articleview/1339/1/129/ (last visited Aug. 5, 2011).

[30] Id.

[31] Joseph Christiana, *Law Enforcement Response to Concerns Regarding RFID Technology*, Harvard School of Engineering and Applied Sciences (Mar. 2, 2007), http://www.eecs.harvard.edu/cs199r/bd-rfid/lawEnforcement.pdf (last visited Aug. 5, 2011).

6. Cell Phones

Many cell phones contain tracking chips which enable cellular providers to identify the location of the user. For instance, the collection of geographic data ("geodata") by Apple began in April 2010, starting with iPhone OS 3.2 and continuing into the current iOS 4 software.[32] According to Apple, geodata is being tracked and transmitted only when the Location Services option in the settings menu is turned on.[33] The device then transmits geodata about nearby cell towers and Wi-Fi access points.[34] The collected geodata is stored on the device, anonymized with a random identification number, and transmitted over an encrypted Wi-Fi network once every 12 hours to Apple.[35] It is reasonable to expect that government will eventually attempt to tap the troves of information maintained by Apple and other cellphone providers.

7. Collection of Wi-Fi Data

Google has been the subject of numerous privacy lawsuits recently as a result of collecting data from computers on unencrypted Wi-Fi networks.[36] The data collected include files and

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[32] Brian X. Chen, *Why and How Apple Is Collecting Your iPhone Location Data*, Wired.com (Apr. 21, 2011), http://www.wired.com/gadgetlab/2011/04/apple-iphone-tracking. (last visited Aug. 5, 2011).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See e.g.*, Associated Press, *Google Sued Over Street View* (April 5, 2008), http://articles.boston.com/2008-04-

emails sent over the Internet from computers on the networks.[37] The data were collected by a software program installed in Google's "street cars" which was designed to triangulate Wi-Fi signals for mapping purposes.[38] The Google operation collected personal information from literally millions of Internet users without their knowledge or consent.[39] There is no reason to think that government officials are not, or will not be using this technology to collect data from individuals. Recently, a professor at Stevens Institute of Technology invented for a mere $600 an aerial drone that can spy on even private Wi-Fi networks.[40] The drone the professor created was a mere eighteen inches long. [41] Such a device could be used to detect financial information, personal correspondence, and any other data transmitted over the wireless network.[42] Coupled with the visual component of the aerial drones discussed above,

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05/business/29275926_1_street-level-photos-google-site-street-view (last visited Sept. 2, 2011).

[37] *Id.*

[38] Andrew Hough, *Google Wi-Fi Privacy Row: Eric Smidt Admits Search Engine 'Screwed up'*, The Telegraph (June 4, 2010), http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/8549781/Eric-Schmidt-admits-he-screwed-up-over-Facebooks-networking-power.html (last visited September 13, 2011).

[39] *Id.*

[40] Bob Yirka, *Group Shows Botnet Threat in the Future May Come From the Sky*, physorg.com (Sept. 9, 2011), http://www.physorg.com/news/2011-09-group-botnet-threat-future-sky.html (last visited September 13, 2011).

[41] *Id.*

[42] *Id.*

aerial drones will be capable of detecting almost all intimate or personal activity.

8. Social Networks

The government has shown a great deal of interest in utilizing social networking information for a variety of information-gathering activities. Among them is the Drug Enforcement Agency's (DEA's) use of YouTube, twitter, and MySpace to track alleged criminals.[43] A presentation created by the DEA to instruct officers in the uses of social networking details the ways that an agent can utilize these resources to aid in investigations.[44] For instance, the DEA recommends utilizing visualizing programs available online for both MySpace and YouTube that chart connections between users based on subscribers, subscriptions, and friends.[45] It also invites agents to utilize a site that appears to exploit a glitch in MySpace to allow agents to view pictures that users have designated as private.[46]

The Department of Homeland Security has established a Social Networking Monitoring Center ("SNMC") to monitor social networking sites for "items of interest."[47] Documents obtained by the

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[43] *DEA Social Networking Presentation*, Electronic Frontier Foundation (May 14, 2010), http://www.eff.org/files/20100514_dea_socialnetworking.pdf (last visited Aug. 5, 2011).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Jennifer Lynch, *New FOIA Documents Reveal DHS Social Media Monitoring During Obama Inauguration*, Electronic Frontier Foundation (Oct. 13, 2010)

Freedom of Information Act indicate that the Department of Homeland Security has discussed the utility of mass collection and use of social network information.[48] Prior to President Obama's inauguration, the Department of Homeland Security collected a massive amount of data on individuals and organizations tied to the political event.[49] While the document does emphasize the minimization and elimination of "Personally Identifiable Information" (PII) from the public data, it notes that "[o]penly divulged information excluding PII will be used for future corroboration purposes and trend analysis during the Inauguration period."[50] It is unclear whether or not the information was permanently deleted following the inauguration proceedings.[51] Moreover, recent studies and papers indicate that, even without PII, comments and information about people online can be "re-identified" through the use of sophisticated computational techniques.[52]

9. Facial Recognition

Facial-recognition software is another tool in police forces' surveillance arsenal. This technology can work in many ways. Biometric profiling works by taking a photograph of a person's face, then comparing characteristics such as the distance between the eyes and length of the nose to other

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http://www.eff.org/deeplinks/2010/10/new-foia-documents-reveal-dhs-social-media (last visited Aug. 5, 2011).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

photographs.[53] Police also employ the Mobile Offender Recognition and Information System (MORIS), which snaps a high resolution photo of the subject and then analyzes 235 unique features in each iris and uses an algorithm to match that person with their identity if they are in the database.[54] The system can easily be placed onto the back of a smart phone and only weighs 12.5 ounces. The photos are stored in a national database of criminal records managed by BI2 (Biometric Identification & Intelligence Technologies).[55] An iPhone and Android application which utilizes facial-recognition software and fingerprint scanners is currently in development.[56]

Facial-recognition software is also currently being used in conjunction with public surveillance cameras at airports and major public events to spot suspected terrorists or criminals.[57] Cities such as Tampa have attempted to use this technology on busy sidewalks and in public places.[58]

Despite its growing usage, evidence indicates that facial-recognition software has an enormous

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[53] *Q&A on Facial-Recognition*, ACLU (Sept. 2, 2003), http://www.aclu.org/technology-and-liberty/qa-face-recognition. (last visited Aug. 5, 2011).

[54] Emily Steel, *How a New Police Tool for Face Recognition Works*, Digits (July 13, 2011), http://blogs.wsj.com/digits/2011/07/13/how-a-new-police-tool-for-face-recognition-works/ (last visited Aug. 29, 2011).

[55] *Id.*

[56] *Id.*

[57] Q&A on Facial Recognition, *supra*.

[58] *Id.*

likelihood of returning a false positive.[59] For instance, a productivity test in Germany revealed that facial recognition software only had a 60% success rate during the day and dropped to 10% success rate at night.[60]

10. Iris Scanners

Iris scanners have quickly moved from the realm of science fiction into everyday public use by governments and private businesses. Though the idea of identifying individuals through eye-scanning sounds very futuristic, the technology behind it is very simple.[61] Essentially, a digital camera takes a high-contrast picture of the iris utilizing visible and near-infrared light.[62] The camera can focus automatically on an eye at increasingly high speeds.[63] After the picture is taken, a computer analyzes the patterns of the iris, as well as its relationship with the rest of the eye, and translates those patterns into a code.[64] There is a small chance of mistaking the iris of one individual for the iris of another, but the iris can be more reliable than fingerprints for identification purposes.[65] Iris

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[59] *Id.*; Peter Jameson, *Facial Profiling*, SF Weekly (July 14, 2010), http://www.sfweekly.com/2010-07-14/news/facial-profiling/ (last visited Aug. 29, 2011).

[60] *Id.*

[61] Tracy V. Wilson, *How Biometrics Works: Iris Scanning*, howstuffworks.com, http://science.howstuffworks.com/biometrics4.htm (last visited Sept. 13, 2011).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

recognition is rarely impeded by contact lenses or eyeglasses, and it can work with blind individuals as well.[66]

As explained above, a number of police departments in the United States have already begin using MORIS, and this system can function as an iris scanner.[67] While the device is ostensibly used for identifying criminals and those in custody, there is nothing, in principle, to stop an officer from randomly scanning the population.[68] Although the handheld-variety of these scanners requires overt cooperation from the person being scanned, there is no reason to think that police will not employ more sophisticated scanners in the near future.[69]

The foregoing is evidenced by the recent introduction of sophisticated iris scanners by the city of Leon, Mexico.[70] The city has introduced iris scanners in a number of public locations, including train stations, shopping centers, medical centers,

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[66] *Iris Scanners and Recognition*, Find Biometrics, http://www.findbiometrics.com/iris-recognition/ (last visited Sept. 13, 2011).

[67] Zach Howard, *Police to Begin iPhone Iris Scans Amid Privacy Concerns*, Reuters (July 20, 2011) http://www.reuters.com/article/2011/07/20/us-crime-identification-iris-idUSTRE76J4A120110720 (last visited Sept. 13, 2011).

[68] *See Id.*

[69] *Id.*

[70] Kat Higgins, *Mexican City Tracks Public With Iris Scanners*, Sky News Online (Aug. 20, 2010), http://news.sky.com/home/technology/article/15698769 (last visited Sept. 13, 2011).

and banks.[71] The scanners can scan up to 50 people a minute without requiring the individuals to stop and stand in front of the scanners. The city introduced the scanners to reduce crime and catch criminals, but the information gathered from the scanners is sent to a central database that can be used to track any individual's movement throughout the city.[72] A spokesman for the manufacturer of the devices claims that "every person, place, and thing on this planet will be connected [via the scanners] within the next 10 years."[73] While iris scanners may have sounded like mere science fiction twenty years ago, the truth is that they exist now and the concerns that they present for personal privacy and other freedoms are with us today. Waiting until this sort of surveillance technology is in use everywhere before setting limits on its use by police is imprudent. The Court must act now to preserve our Fourth Amendment rights.

B. The Ramifications of Unchecked Surveillance

Approving the type of warrantless GPS surveillance conducted in the instant case would result in the virtual evisceration of meaningful protection of individual privacy. The current state of technology enables government agents to monitor unsuspecting citizens in virtually any situation. Unless this Court's Fourth Amendment framework includes protection against pervasive spying methods that are physically unintrusive and monitor

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[71] *Id.*

[72] *Id.*

[73] *Id.*

a person's activities in public, the core value of the Fourth Amendment will be fundamentally undermined. Even in public places, every citizen retains a reasonable expectation of privacy that is offended when the government conducts covert, all-encompassing surveillance without judicial oversight.

1. Unchecked Surveillance Will Result in the Conceptual Erosion of Liberty

One of the hallmarks of citizenship in a free society is the expectation that one's personal affairs and physical person are inviolable so long as one conforms his or her conduct to the law. Any meaningful conception of liberty encompasses freedom from constant and covert government surveillance—whether or not that intrusion is physical or tangible and whether it occurs in public or private. Thus, unchecked technological surveillance is objectionable simply because government has no legitimate authority to covertly monitor the totality of a citizen's daily activities. The root of the problem is not that government is doing something inherently harmful, but rather that government is doing something it has no license to do.

For the average American, even surveillance limited to one's movements on public roads provides law enforcement with a comprehensive portrait of one's life. The sense of insecurity and suspicion of government intrusion that would result from the advent of warrantless technological surveillance would be highly detrimental to the relationship of the citizenry to its government. This is precisely one

of the harms that the Fourth Amendment was crafted to prevent.

A study conducted by Roger Clarke, the famed Australian specialist in data surveillance and privacy, indicates that the costs resulting from the erosion of personal privacy are so significant that they essentially threaten the very foundation of a democratic society. Some of the most serious harms include:

- A prevailing climate of suspicion and adversarial relationships
- Inequitable application of the law
- Stultification of originality
- Weakening of society's moral fiber and cohesion
- Repressive potential for a totalitarian government
- Blacklisting
- Ex-ante discrimination and guilt prediction
- Inversion of the onus of proof.[74]

The most troubling characteristic of warrantless searches, however, is the extent to

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[74] *The Digital Persona and its Application to Data Surveillance*, The Information Society 10, 2 (June 1994), http://www.rogerclarke.com/DV/DigPersona.html (last visited Aug. 29, 2011).

which they are capable of serving as the backbone for a totalitarian state. The frightening effects of warrantless surveillance are somewhat blunted insofar as those entrusted with such awesome powers exercise them responsibly; however, establishing secretive, unchecked mechanisms of state monitoring is essentially an invitation to abuse. As every student of American history is taught, our governmental system of checks and balances was premised on the awareness that trust in the restraint of those in power is not sufficient to protect liberty. Structural restraints and oversights are imperative. If warrantless use of GPS tracking is allowed, an essential structural protection of liberty—judicial oversight—is lost and the privacy of all citizens is threatened.

2. Unchecked Surveillance Will Result in a Chilling Effect on First Amendment Freedoms

Among the most significant detrimental effects of covert, warrantless government surveillance is the chilling effect it has on free speech and association and the harm such deprivations of First Amendment rights has on democratic institutions. *See Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 556-57 (1963). Indeed, when citizens—especially those espousing unpopular viewpoints—are aware that the intimate details of their personal lives may be pervasively monitored by government, they are less likely to freely express their dissident views.

Warrantless tracking enables police to give effect to natural biases in targeting individuals for

surveillance. While the government argues that judicial approval for warrantless technological surveillance will not result in widespread "dragnet" searches, its argument to this effect proves too much. For, in fact, the greater cause for concern is that if judicial oversight is not a required component of GPS tracking and other technological surveillance, the likely result will be the government's *selective* installation of GPS tracking devices on vehicles driven by persons who exercise speech and association rights representing "extreme" or disfavored views. Without the gatekeeping function of a warrant requirement, the cost-effective nature of GPS devices will unquestionably allow for this type of viewpoint-based surveillance on a massive scale.

In those instances where government has attempted to compel disclosure of a dissident group's membership, the Supreme Court has recognized it is crucial that speech and association rights be free from government-mandated disclosures that result in a chilling of these core First Amendment rights. For example, in *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), where the State of Alabama moved to compel the NAACP to disclose the names and addresses of its Alabama members, this Court observed that effective advocacy of controversial viewpoints is enhanced by group association. *Id.* at 460. Based on the unpopular nature of the NAACP and the discriminatory treatment that its members received during the civil rights movement, the Court ultimately concluded that disclosure of the NAACP's membership would hinder the ability of the organization to pursue its efforts. *Id.* at 462-463.

Likewise, in *Gibson*, *supra*, at 544, the Court noted that speech and association rights need breathing space to survive. These freedoms are protected not only against heavy-handed frontal attack, but also from stifling by subtler governmental interference. *Id.*

The government's desire to monitor and ascertain the membership rosters of dissident or unpopular groups continues today.[75] The values protected by this landmark precedent are endangered by the advent of warrantless technological surveillance. Because 24-hour vehicle monitoring—and other new technologies—permit the police to efficiently obtain detailed information about unpopular groups, including the location of meetings and the identities of attendees, allowing the police to freely install GPS tracking devices on vehicles would substantially chill speech and association rights. Individuals will undoubtedly be reluctant to associate with socially taboo groups if they know that Big Brother may be compiling and publishing information about their membership.

The chilling effects of pervasive surveillance extend beyond political dissidents and impact all citizens, for the mere possibility of this type of warrantless surveillance will result in a constant,

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[75] *See e.g.*, Department of Homeland Security: Office of Intelligence and Analysis, ***Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment,*** Department of Homeland Security (April 7, 2009), http://www.rutherford.org/pdf/2011/02-03-2011_Rightwing-Extremism.pdf (last visited Sept. 28, 2011).

justifiable apprehension in even the most compliant, passive citizen. Americans have heretofore assumed that adherence to the laws of the land earns them a degree of protection from the prying eyes and ears of government, and they should be able to continue to assume this.

II. Technological Surveillance Such as the GPS Tracking In This Case Must Be Held to Implicate Fourth Amendment Warrant Requirements

A. The GPS Tracking Without a Warrant Constituted an Unreasonable "Search"

Because the GPS monitoring conducted by law enforcement violated Jones' reasonable expectation of privacy, this Court should uphold the D.C. Circuit's decision that a search occurred within the meaning of the Fourth Amendment. The Court should further hold that any GPS monitoring, regardless of duration, constitutes a search for purposes of the Fourth Amendment.

Relying primarily on *United States v. Knotts*, 460 U.S. 276 (1983), the government argues in this case that a search has not occurred because an individual has no reasonable expectation of privacy in his movements on public roadways.[76] Petition for

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[76] Interestingly, the government initially believed attachment of the device implicated the Fourth Amendment since they sought and obtained a court order to allow attachment of the device. J.A. 21-26. However, when it attempted to incriminate Jones with GPS tracking evidence obtained after that order expired, it

Writ of Certiorari at 11, *U.S. v. Jones*, __ U.S __ (2011) (No. 10-1259). This Court has recognized, however, that an individual retains a right of privacy while in his or her automobile in public places. *See also Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) ("The exercise of a desire to be mobile does not...waive one's right to be free of unreasonable government intrusion."). Furthermore, *Knotts* is not dispositive of the questions presented here. The concerns and questions raised in this case—GPS technology and its potential for mass surveillance—were specifically alluded to and reserved in *Knotts*. *Knotts*, 460 U.S. at 283-84; *see also* Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 419 UCLA L. Rev. 409, 457 (2007).

Rapid advances in the field of surveillance technology have qualitatively recast the issues presented in prior Fourth Amendment cases generally, and in *Knotts* particularly. Consequently, an updated jurisprudential approach cognizant of the virtually unlimited potential of modern surveillance technology is required in order to preserve the vitality of the Fourth Amendment.

The beeper utilized by law enforcement personnel in *Knotts* was primitive compared to modern GPS devices. *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009). Beepers are "passive radio transmitters which neither store nor collect data, but rather permit real-time tracking," whereas "a GPS

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adopted the position that no Fourth Amendment search or seizure occurred. *United States v. Jones*, 415 F.Supp. 2d 71, 87-88 (D.D.C. 2006).

device utilizes a network of orbital satellites, which calculate the device's longitude and latitude, information which the GPS then stores in memory or transmits through radio or cell-phone technology." Brief and Record Material for Appellee at n.35, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2009) (Nos. 08–3030, 08–3034). Beepers, unlike GPS devices, require a law enforcement presence within the vicinity in order to receive the beeper's transmissions. In *Knotts*, for instance, vehicle tails and helicopter surveillance were necessary to ensure continued reception of the beeper's radio signals. *Knotts*, 460 U.S. at 278. Thus, GPS permits a covert quality of surveillance that simply cannot be achieved with beeper technology.

The quantity and *undetectability* of monitoring operations made possible by GPS also serves to distinguish the situation in the instant case from mere visual surveillance. Although data gleaned from use of GPS technology theoretically could be obtained via visual surveillance, the two methods stand in stark contrast in terms of resources expended and in terms of the subject's ability to know he is being monitored—an element Amici submits is highly relevant to evaluating reasonable expectations of privacy. *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007). GPS enables law enforcement to acquire a degree of information "virtually impossible to obtain through visual surveillance...unless police resources were unlimited." April A. Otterberg, *GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's Theory of Public Space Under the Fourth Amendment*, 46 B.C. L. Rev. 661, 696 (2005). Other experts have concurred with this

sentiment, stating, "no one human or organization of human observers is currently capable of such comprehensive, continuous, and accurate information regarding location and movement monitoring." Lenese Herbert, *Challenging the (Un)Constitutionality of Governmental GPS Surveillance*, 26 Criminal Justice 34, 35 (Summer 2011).

The volume of data obtainable via GPS monitoring is sufficiently comprehensive to render that method of surveillance qualitatively distinct from visual monitoring. GPS tracking substitutes for the natural sensory capacities of law enforcement officers, *State v. Jackson*, 150 Wash.2d 251, 262 (Wash. 2003), rather than merely "augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology" can afford them. *Knotts*, 460 U.S. at 282. GPS monitoring does not merely increase police "efficiency," *Knotts*, 460 U.S. at 284; rather, it "facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period." *Weaver*, 909 N.E.2d at 1199.

Electronic tracking violates reasonable expectations of privacy in part because it reveals "intimate details" that go beyond the data law enforcement could acquire in the absence of technological assistance. *Weaver*, at 1199. Unlike GPS tracking, visual surveillance is "of limited scope, purpose and duration." *Unites States v. Holmes*, 521 F.2d 859, 865 (5th Cir. 1975). Extended GPS monitoring can reveal far more "intimate

details" of a person's habits than one trip viewed in isolation (the scenario present in *Knotts*). A picture of one's entire life can be pieced together from extended GPS monitoring through the aggregation of individual trips on public roadways.

This problem does not arise when law enforcement personnel physically conduct surveillance. First, a reasonably astute individual will have some measure of awareness of the proximity of other persons or vehicles in the vicinity, thus vesting him with a choice as to what information he will "expose" to others. Second, even a full team of officers monitoring an individual around the clock will not catch his every movement. A person can preserve his anonymity from prying eyes, even in public, by changing course, travelling in darkness, moving quickly through buildings, and changing his appearance. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from ord. denying reh'g en banc). But a GPS device is different. One cannot hide from the "all-seeing network of GPS satellites that hover overhead, which never sleep, never blink, never get confused and never lose attention." *Id.*, 617 F.3d at 1126 (Kozinski, C.J., dissenting from ord. denying reh'g en banc).

Amici submits that the key to unlocking a proper, workable interpretation of the Fourth Amendment in the context of technological surveillance may simply require careful application of the *Katz* Court's articulated standard. Under the analysis employed there, activity is beyond the scope of one's "reasonable expectation of privacy" where it is "knowingly expose[d] to the public." *Katz v.*

United States, 389 U.S. 347, 351 (1967). *Amici* submits that a proper emphasis on the extent to which a person *knows* that information is being exposed to others would provide a substantial degree of protection of citizens' privacy from technological surveillance.

Under this standard, warrantless GPS tracking is unsustainable because an individual does not "knowingly" expose his vehicular whereabouts to any member of the public over a span of multiple days. Moreover, to the extent that a motorist's travels take him to secluded locations where no members of the public are visibly present, he is not "knowingly" exposing this information to the public. Under such circumstances, the average American reasonably believes himself to be enjoying a degree of privacy and reasonably expects such privacy exists.

Recognizing Jones' expectation of privacy in his vehicular whereabouts over time and in unpopulated areas as reasonable would comport with this Court's Fourth Amendment jurisprudence and help to ensure the relevance of the Fourth Amendment in the digital age. This Court should further conclude—for the doctrinal reasons enumerated above—that *all* GPS monitoring of potential suspects constitutes a search for purposes of the Fourth Amendment. Predicating Fourth Amendment protections solely on the volume of data obtained or the temporal length of surveillance involved would significantly muddy Fourth Amendment jurisprudence and saddle law enforcement personnel and private citizens with unnecessary confusion regarding the scope of

citizens' constitutionally-protected civil liberties. While the government also seeks a clear rule respecting the use of GPS devices, its request that use in no case violates the Fourth Amendment grossly undervalues the right and expectation of privacy enjoyed by citizens. A clear rule finding one's "reasonable expectation of privacy" to be transgressed when secretive technological surveillance escalates an individual's "exposure" beyond that which an average person anticipates from the general public would provide a desperately-needed check on the privacy-eroding tendencies of law enforcement and modern technology.

B. The Installation of the GPS on Jones' Vehicle Without His Knowledge Constituted a Seizure

Not only does the GPS monitoring conducted by law enforcement in the instant case constitute a search, but the physical installation of the GPS device on Jones' car also qualifies as a seizure under the Fourth Amendment. A seizure occurs when "there is some meaningful interference with an individual's possessory interests" in his property. *United States v. Jacobsen*, 466 U.S. 109, 113, 114 (1984). "Meaningful interference" includes not only the physical taking of property, but also property damage or even the temporary interruption of property use (as in a roadside traffic stop). *Notice v. Koshes*, 386 F.Supp. 2d 23 (D. Conn. 2005); *United States v. Maltais*, 295 F.Supp. 2d 1077 (D.N.D. 2003), *affirmed*, 403 F.3d 550 (8th Cir. 2005).

In seizure cases involving actual physical intrusions into citizens' property, this Court has

applied an especially exacting standard. Thus, in *Silverman v. United States*, 365 U.S. 505 (1961), police use of a spike mike protruding ever-so-slightly into the air duct of Silverman's home was found unconstitutional. The Court based its decision on the fact the there was "an actual intrusion into a constitutionally protected area." *Id.* at 512. This Court has noted that the Fourth Amendment protects property as well as privacy. *Soldal v. Cook County, Illinois*, 506 U.S. 56, 62 (1992). In the present case, there was undoubtedly an intrusion into Jones' personal property that transgressed the Fourth Amendment's protection of the right of a property owner to exclude government officials from unreasonable, unauthorized use of that property.[77]

While judicial frameworks, doctrines, and interpretive lenses undoubtedly aid in the application of constitutional language to specific cases in most instances, there are times when these multiple lenses can instead effect the obscuring of what is otherwise relatively clear from the language of the Constitution itself. The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." Clearly, this provision was intended to forbid government interference with the rights inherent in property ownership for the purpose of acquiring information. One right inherent in property ownership is the right to exclude others from using that property in a way that is helpful to

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[77] See Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 Wake Forest L. Rev. 307, 351 (1998).

them, but potentially detrimental to oneself. Surely, then, the Fourth Amendment was meant to protect a citizen against government tinkering with one's private property—however harmless to the property itself—that effectively converts the property into an instrument used by unknown agents to spy on the owner.

Black's Law Dictionary defines "possessory interest" as a "Right to exert control over specific land to exclusion of others." Clearly, this right of exclusion is a fundamental component of the possessory interest that implicates the warrant requirement under the Fourth Amendment.

CONCLUSION

New technologies which enable the radical expansion of police surveillance operations require correspondingly robust legal frameworks in order to maintain the scope of freedom from authoritarian oversight envisioned by the Framers; such technologies are "doctrine-forcing." *Weaver*, 909 N.E.2d at 1198. Establishing a clear rule requiring warrants for GPS monitoring would provide needed guidance to law enforcement agencies, quell litigation, protect civil liberties including cherished First Amendment rights, and ensure the viability of the Fourth Amendment even at the dawn of a new age of surveillance technology.

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTOINE JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE*, YALE LAW SCHOOL INFORMATION SOCIETY PROJECT SCHOLARS AND OTHER EXPERTS IN THE LAW OF PRIVACY AND TECHNOLOGY IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, letters indicating the parties' consent to the filing of this *amicus* brief have been submitted to the Clerk.

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SUMMARY OF ARGUMENT

Advanced surveillance technologies significantly enhance law enforcement's ability to maintain order and public safety. However, in an era of rapidly advancing technologies, from thermal imagers to automated tracking devices, it is critical to ensure that these technologies are used only "in a manner which will conserve ... the interests and rights of individual citizens," *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (internal citation omitted), and conform to the Fourth Amendment. In most cases, "requiring a warrant will have the salutary effect of ensuring that use of [new technology] is not abused." *See United States v. Karo*, 468 U.S. 705, 717 (1984). The

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[3] Fellows of the Information Society Project at Yale Law School, Nabiha Syed, Albert Wong, and David Thaw, helped to prepare this brief under the supervision of Priscilla Smith, Senior Fellow of the ISP.

panel below correctly recognized that Global Positioning System ("GPS") surveillance technology used for prolonged surveillance of a target's activities in public should be subject to the warrant requirement.

The Fourth Amendment's warrant requirement applies to a surveillance technology used in public if the technology: 1) extends beyond human capabilities for surveillance, increasing the potential for surveillance abuse; and 2) collects information the public expects to be private in a way that is not generally used and/or accepted by the general public.

In this case, first, surveillance with GPS is conducted *not by people* but by advanced tracking devices communicating with satellites in orbit and computers on the ground. As a technological substitute for traditional visual tracking, it substantially expands human capabilities far beyond "naked-eye"[4] surveillance and vastly increases the potential for law enforcement abuse of GPS technology to conduct prolonged surveillance both against individuals as well as groups of individuals.

Second, prolonged surveillance using GPS technology intrudes on reasonable expectations of privacy under this Court's precedents and according to tests suggested by scholarship. It provides the government with detailed information about an individual's movements, associations, contacts and activities, allowing the storage, analysis, and comparison of that data with data gathered from others, all with minimal involvement of law

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[4] See Kyllo, 533 U.S. at 33.

enforcement officers. As the panel correctly held, the type and scope of information collected enables government to monitor people's political associations, their medical treatment, and their amorous liaisons, in a way that invades their privacy and chills expression of other fundamental rights. It allows surveillance of citizens on a scale that this country has never seen and in a way that the general public has rejected.[5]

United States v. Knotts,[6] relied on by the Government, is limited to the use of beeper technology as a sense-enhancement of, *not a replacement for*, "naked-eye" surveillance.[7] This Court has always required warrants for the use of privacy-invading technologies that replace human or other natural senses with technological ones.[8] Moreover, in *Knotts* this Court reserved the question of twenty-four hour dragnet surveillance using powerful new technologies.

This Court should affirm the decision of the Court of Appeals,[9] and clarify that, while law enforcement

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[5] *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing *en banc*) (making comparison to surveillance under totalitarian regime); *United States v. Cuevas-Perez*, 640 F.3d 272, 294 (7th Cir. 2011) (Woods, J., dissenting) (GPS surveillance invites "an unprecedented level of government intrusion into every person's private life.").

[6] 460 U.S. 276 (1983).

[7] Compare *Knotts*, 460 U.S. at 282 *with Karo*, 468 U.S. at 714-15.

[8] *See Kyllo*, 533 U.S. at 40; *Karo*, 468 U.S. at 717; *Katz v. United States*, 389 U.S. 347 (1967); *Walter v. United States*, 447 U.S. 649 (1980).

[9] *See United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

may employ GPS tracking devices in their efforts to enhance public safety, use of GPS technology in this case required a warrant to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[10]

ARGUMENT

I. The Fourth Amendment Requires a Warrant Where Invasive Surveillance Technologies Increase the Potential for Abuse.

The Fourth Amendment provides our primary protection against "a too permeating police surveillance" and abuse of police authority,[11] and "gives concrete expression to a right of the people which 'is basic to a free society.'"[12] As has been thoroughly documented,[13] the Framers drafted the Fourth Amendment to protect citizens against arbitrary government invasions in direct response to searches and seizures conducted under the authority of general warrants by British officers targeting

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[10] *See Kyllo*, 533 U.S. at 34.

[11] *United States v. Di Re*, 332 U.S. 581, 595 (1948).

[12] *Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967). *See also Byars v. United States*, 273 U.S. 28, 33-34 (1927) (Fourth Amendment "adopted in view of long misuse of power in the matter of searches and seizures.").

[13] *See, e.g.*, Susan W. Brenner, *The Fourth Amendment in an Era of Ubiquitous Technology*, 75 Miss. L. J. 1, 5-7 (2005); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 741 (1999).

political opponents both in England and in the colonies.[14]

The Fourth Amendment's warrant requirement ensures that "the usual inferences which reasonable men draw from evidence" be drawn "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[15] Without a judge's predetermination of probable cause, "the far less reliable procedure of an after-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[16]

Moreover, the Framers designed the Fourth Amendment not only to protect personal spaces, but also to preserve an open democratic process and prevent police surveillance from being used to discourage active participation in the political process.[17] As this Court recognized:

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[14] *See, e.g., Payton v. New York*, 445 U.S. 573, 583 & n.21 (1980); *Camara v. Mun. Ct. of City & Cty. of S.F.*, 387 U.S. 523, 528 (1967) (Fourth Amendment designed to protect "against "arbitrary invasions.").

[15] *Id.* at 621 n.24. Indeed, historians explain that the Framers did not consider the possibility that government agents would use *their own* discretion to conduct searches, without any warrant whatsoever; they were concerned that they would overuse general warrants. *See* Davies, *Recovering the Original Fourth*, 98 Mich. L. Rev. at 741.

[16] *Katz*, 389 U.S. at 358 (citing *Beck v. Ohio*, 379 U.S. 89, 96 (1964)).

[17] *See United States v. U.S. Dist. Ct. for the E.D. Mich.*, 407 U.S. 297, 314 (1972).

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.[18]

Indeed, our freedom to discuss, disagree with, and challenge the government has depended in part on the government's inability to continually follow all, or even large groups, of us at any time for any reason. When new surveillance technologies allow government officials to perform activities that were once prohibitively expensive or even impossible, they undermine this critical assumption and increase the possibility of abuse and its attendant danger to individual privacy. When universal surveillance becomes both feasible and cheap, officials will use it, rather than ask whether the benefits of surveillance are outweighed by the loss of constitutional values. The warrant requirement keeps constitutional protections in line with changing technology,[19]

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[18] *Id.*; *see also* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 Geo. Wash. L. Rev. 1306, 1309 (documenting "history of [surveillance] abuses" in the period before 1978 and that "domestic security surveillance was often executed" in ways "that posed serious threats to the democratic process.").

[19] *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009) (noting that "without judicial oversight, the use of these powerful [GPS] devices presents a significant and, to our minds, unacceptable risk of abuse.").

requiring government officials to justify superhuman surveillance that has become as inexpensive as flipping a switch.

Although there are no nationwide statistics available on the frequency of GPS surveillance, and most police departments resist disclosing how often they use it, evidence of widespread use exists. The FBI's training program's legal division has issued a special bulletin advising officers in the use of GPS,[20] and some local jurisdictions have willingly reported the scope of their use.[21] One relatively small police department in Fairfax, Virginia, reports using GPS surveillance sixty-one times in 2005.[22]

Indeed, other courts have recognized that the specter of ubiquitous surveillance is not hypothetical; it is a technological reality.[23] In one recent incident,

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[20] *See* Keith Hodges, *Tracking "Bad Guys": Legal Considerations in Using GPS*, FED. BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN (FBI, Washington, D.C.), July 2007, at 25 ("*Tracking 'Bad Guys'*"), *available at* http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/FBI-LE-Bulletin-GPS-Tracking-Jul2007.pdf/view?searchterm=GPS.

[21] *Foltz v. Commonwealth*, 698 S.E.2d 281, 284 n.3 (Va. Ct. App. 2010) (discussing evidence of frequency of use by local law enforcement in challenge to GPS surveillance); *see also* Ben Hubbard, *Police Turn to Secret Weapon: GPS Device*, WASH. POST, Aug. 13, 2008, at A1 ("*Secret Weapon*").

[22] Hubbard, *Secret Weapon*, *supra* n.22 at A1 (National Association of Criminal Defense Lawyers reports widespread use in large cities and small towns).

[23] *See e.g.*, *Weaver*, 909 N.E.2d at 1201 (inability to discern "any reason, apart from hunch or curiosity" for the use of GPS surveillance); *id.* at 1203 (without judicial oversight, use of GPS surveillance presents "significant and, to our minds,

a twenty-year-old American citizen and college student from Santa Clara, California, Yasir Afifi, discovered a GPS surveillance device affixed to his car. Afifi's father, also an American citizen, was president of a Muslim community association in the U.S. before moving to Egypt in 2003. Forty-eight hours after Afifi removed the device and asked for help online to identify it, he was visited by FBI agents who demanded he return the device. To date, he has not been charged with a crime, and the FBI has provided no further details.[24] Because the FBI obtained no warrant for the device, the public was denied the minimum level of accountability that a warrant provides.

II. This Court Should Continue to Prevent New Surveillance Technologies From Encroaching Protected Privacy Interests.

Because new technologies can create powers of surveillance that were not anticipated when old legal standards were developed, this Court evaluates the specific nature of the technology at issue and its potential for abuse.[25] This Court rejects "mechanical" application of standards that allow

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unacceptable risk of abuse); *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (*en banc*) (same).

[24] Kim Zetter, *Caught Spying on Student, FBI Demands GPS Tracker Back*, WIRED, Oct. 7, 2010, *available at* http://www.wired.com/threatlevel/2010/10/fbi-tracking-device/all/1. Afifi recently filed suit seeking damages. *CAIR: FBI Sued for Warrantless GPS Surveillance of Calif. Muslim*, PRNEWSWIRE, Mar. 2, 2011, *available at* http://www.prnewswire.com/news-releases/cair-fbi-sued-for-warrantless-gps-surveillance-of-calif-muslim-117251848.html.

[25] Means of surveillance, not only results, determine acceptability of form of inquiry. *Kyllo*, 533 U.S. 37-39.

end-runs around Fourth Amendment protections, leaving us "at the mercy of advancing technology."[26] Instead, the Court encourages adoption of rules that "take account of more sophisticated systems that are already in use or in development,"[27] and that will "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted":[28]

> [T]he assurance against any revival of [police abuse], so carefully embodied in the fundamental [Fourth Amendment] law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.

Byars, 273 U.S. at 33-34.

This Court has modified its Fourth Amendment inquiry when necessary to ensure that the original meaning of the Amendment is carried forward. In *Katz*, the Court evaluated use of a novel listening device that attached to the *outside* of phone booths but nevertheless allowed police officers to eavesdrop on a target's phone conversations. The officers' actions met the technical requirements of Fourth Amendment doctrine at the time, which prohibited only *physical* intrusions into the private sphere.[29]

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[26] *See Kyllo*, 533 U.S. at 35-36.

[27] *Id.* at 37.

[28] *Id.* at 34.

[29] *See Olmstead v. United States*, 277 U.S. 438, 466 (1928). *See* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 Wash.

The Court modified the doctrine to fit new realities, recognizing that the difference between physical and electronic intrusion had "no constitutional significance."[30] The Court held that the Fourth Amendment protects "people, not places,"[31] and emphasized that notions of privacy and improper intrusion cannot be defeated by technological end-runs around previous doctrine.[32]

The Court has used the distinction between sense-enhancing and sense-creating technologies to prevent surveillance from becoming ubiquitous and thus escaping the purposes of the warrant requirement. While the Court has approved the use of some primitive "sense-enhancing" technologies to aid officers conducting visual surveillance, the Court has limited their use and has *never* allowed warrantless use of sense-creating technologies—those that do not enhance human senses but substitute for human tracking.[33] For example, in *United States v. Lee*,[34] the Court confirmed that no search took place where officers used "searchlights"

L. Rev. 119, 132 (2004) (arguing that *Katz* reflects a change in belief about what constitutes a person's private sphere) ("*Contextual Integrity*").

[30] *Katz*, 389 U.S. at 353.

[31] *Id.* at 351.

[32] *See id.* at 362 (Harlen, J., concurring). Fourth Amendment protections go beyond the walls of each man's "castle." *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (noting that the Framers also "protect[ed] Americans in their beliefs, their thoughts, their emotions and their sensations" (quoting *Olmstead v. United States*, 277 U.S. at 478 (Brandeis, J., dissenting)).

[33] *See Kyllo*, 533 U.S. 33; *Karo*, 468 U.S. at 717; *Walter v. United States*, 447 U.S. 649 (1980); *Katz*, 389 U.S. at 353.

[34] 274 U.S. 559 (1927).

or "marine glass or field glass" to help them see on the deck of a ship at night.[35] This limited form of sense enhancement did not implicate protections against police abuse any more than an individual officer watching without binoculars would have.

In contrast, in *Walter v. United States*,[36] the Court held that using a movie projector—fairly basic technology even at the time—to view films without a warrant was an unreasonable search under the Fourth Amendment. The projector did not just "enhance" sight; it created a new capacity.[37] The use of a technology that gave them the new ability to inspect the strip's contents required warrant authorization.[38]

In *Dow Chemical Co. v. United States*, the Court upheld the warrantless use of an airplane-mounted camera taking pictures of open fields below.[39] Nevertheless, the Court noted that sight enhancement could at some point become so significant that it created a constitutional problem, even for viewing open fields,[40] and "that surveillance of private property by using highly sophisticated

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[35] *Id.* at 563.

[36] 447 U.S. 649 (1980).

[37] *Id.* at 652 n.2.

[38] *Id.* at 654. *See also Katz*, 389 U.S. at 353 (under the sense enhancement rule, no warrant would have been required if police had been able to hear a conversation through a phone booth using a simple enhancement, such as a glass placed backwards on the wall of the booth).

[39] 476 U.S. 227, 237-38 (1986).

[40] *See Dow Chemical v. United States*, 476 U.S. 227, 237-38 (1986) noting that the "mere fact that human vision is enhanced somewhat, *at least to the degree here*, does not give rise to constitutional problems.").

surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."[41]

United States v. Knotts, which upheld the limited use of beepers without a warrant,[42] simply applies the sense enhancement rule of *Lee*: "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[43] The *Knotts* Court specifically reserved the question of technology that gave the government broader surveillance powers; it declined to predict the outcome of a case in which technology allowed for "dragnet type law enforcement."[44]

United States v. Karo, decided one year later, made clear the limits of the *Knotts* decision. The Court held that a warrant *was* required for monitoring and downloading beeper data when the beeper allowed surveillance of areas that officers would not otherwise have been physically capable of

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[41] *Id.* at 238.

[42] In *Knotts*, after obtaining consent from owner of a container, officers placed a beeper within a container knowing it was going to be purchased by the suspect. *Knotts*, 460 U.S. at 278. They did so only after visual surveillance made them suspicious. *Id.* Moreover, officers only used the beeper to maintain contact with the container of chloroform in the vehicle itself, not with the movements of a person. *Id.* at 282.

[43] *Id.* at 282.

[44] *Id.* at 283-84; *see also Maynard*, 615 F.3d at 556 ("[T]he *[Knotts]* Court specifically reserved the question whether a warrant would be required in a case involving 'twenty-four hour surveillance.'").

viewing.[45] Thus, as with the movie projector in *Walter*, when a beeper does not enhance human senses but replaces a human sense with a technological one, a warrant is required.[46]

In *Kyllo*, this Court held that use of thermal-imaging technology to obtain "any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion" constituted a search "at least where (as here) the technology in question is not in general public use." *Id.* at 34. While finding the thermal-imaging technology at issue there "relatively crude," the Court in *Kyllo* advocated adopting a rule that could "take account of more sophisticated systems that are already in use or in development." *Id.* at 36. At some point, the Court warned, technology might not just enhance human senses by allowing us to see and hear from farther distances or in the dark, but could actually create new superhuman powers, like X-ray vision, *see id.* at 36 n.3. If law enforcement had at its disposal the ability to use these non-human powers of surveillance without any warrant limitation, law enforcement technology would

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[45] *Karo*, 468 U.S. at 714.

[46] The dog search cases, *see Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005), holding that a sniff by a dog trained to seek illegal drugs is not a search, are different. First, because dogs are part of the natural world and were traditionally used by police to track people (and by people to hunt), the Framers would have anticipated that use. Moreover, because the sniff can only reveal evidence of illegal activity, the Court held that the only privacy interest implicated by a dog sniff is the interest in keeping illegal activity private, an interest not protected by the Fourth Amendment. *Id.*

"shrink the guaranteed realm of privacy." *See Kyllo*, 533 U.S. at 34.

The Government suggests that the thermal imaging technology in *Kyllo* triggered the Fourth Amendment only because thermal imaging gathered information from inside a home,[47] information that the Court said would otherwise have been obtained only by "a search unequivocally within the meaning of the Fourth Amendment."[48] However, that logic is flawed. If the officers had discovered evidence by looking into the home from outside the house using binoculars, they would have been gathering information that could otherwise only be obtained by a search of the home subject to the warrant requirement. Yet that surveillance would likely have been allowable without a warrant, because the technology (binoculars) would have been allowable sense-enhancing technology.[49]

The relevant concern in *Kyllo* was not whether the information was discovered indoors or outdoors, but rather that the technology went beyond enhancement of senses, beyond binocular-like technology to the X-ray vision category. As the Court wrote, "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth

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[47] Pet. Br. at 22.

[48] *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010), *reh'g en banc denied*, 617 F.3d 1120 (9th Cir. 2010).

[49] The Court rejected as "quite irrelevant" the dissent's objection that heat emanating from the home can sometimes be perceived by observers without the use of technology. *Kyllo*, 533 U.S. at 35 n.2.

Amendment."[50] The use of a technology capable of obtaining images of heat by itself created a new sense, *substituting for* human senses, acting without human limitation or reasoning.[51]

Similarly, GPS surveillance does not involve "sense-enhancement," but creates entirely new abilities beyond the capacity of even amplified human senses. As a "technological substitute for traditional visual tracking,"[52] it should be governed by *Katz, Kyllo* and *Walter*, not *Knotts*. No human being can watch another's every move twenty-four hours a day from the vantage point of outer space, remember each movement over the course of an indefinite period of time, and instantly cross-compare those movements with the pinpointed locations of other targets.[53] A ubiquitous vantage point, the impossibility of losing the tail, perfect memory, and the ability to instantaneously cross-reference data with police-created maps categorically differentiate GPS from the beeper used to enhance police sight-based surveillance in *Knotts*. These

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[50] *Id.*

[51] *Cf Knotts*, 460 U.S. 282; *id.* at 283 (noting the "limited use" which the government made of signals from beeper); *id.* at 284-85 (holding that the beeper signal was not received or relied on after it indicated that the container ended the journey during which it was tracked by a law enforcement officer); *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) (contrasting the types of surveillance).

[52] *See Jackson*, 76 P.3d at 223.

[53] *Weaver*, 909 N.E.2d at 1202-03 (relentless tracking and recording of target's movements for 65 days "could not have been done without GPS); *Jackson*, 76 P.3d at 223 (successful uninterrupted tracking for two and one-half weeks unlikely without GPS).

abilities are not merely enhanced. They are superhuman.

In *Knotts* this Court reserved the question of prolonged, continuous surveillance presented here, as the panel recognized:[54]

> *Knotts* held only that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *id.* at 281, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end.

Maynard, 615 F.3d at 557.[55] The Government tries to dismiss the Court's concern about twenty-four hour surveillance as limited to "mass" surveillance.[56] Such a prospect is not to be taken lightly and indeed the Government's position does not preclude such surveillance.[57] Nevertheless, the Court's concern was

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[54] *Maynard*, 615 F.3d at 556. *See also Pineda-Moreno*, 617 F.3d at 1125-26 (Kozinski, C.J., dissenting).

[55] *See also Dow Chemical*, 476 U.S. at 238 (use of satellite technology, "might be constitutionally proscribed absent a warrant."); Renee McDonald Hutchins, *Tied up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 457 (2007) ("*Tied up in* Knotts*?*").

[56] Pet. Br. at 34.

[57] *See Cuevas-Perez*, 640 F.3d at 294 (Woods, J., dissenting on other grounds) ("it is not clear why the use of GPS technology for mass surveillance would trigger the warrant requirement if the suspicionless surveillance of an individual does not."); *Jackson*, 76 P.3d at 224 (without a warrant, there is no

broader. It included the potential for twenty-four hour surveillance of any *one* individual ("any citizen") without judicial oversight.[58] Warrantless GPS offers the potential that *Knotts* feared.

III. Prolonged GPS Surveillance Requires a Warrant Because It Invades a Reasonable Expectation of Privacy.

As this Court recognized in *Knotts*:

> this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted].

Knotts, 460 U.S. at 280-81. The Government relies on *Knotts* to argue that an individual has no reasonable expectation of privacy in his movements through public space.[59] *Knotts* held nothing of the sort.[60] Moreover, this inside/outside distinction is

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limitation on GPS activity whether criminal activity is suspected or not).

[58] *Knotts*, 460 U.S. at 283 (emphasis added); *see also Pineda-Moreno*, 617 F.3d at 1126 (Kozinski, C.J., dissenting from denial of rehearing en banc) (explaining the potential for mass surveillance); *Maynard*, 615 F.3d at 556-57 (same).

[59] Pet. Br. at 17-27; see also *Pineda-Moreno*, 591 F.3d at 1216-17.

[60] *See also Pineda-Morena*, 617 F.3d at 1125-26 (Kozinski, C.J., dissenting).

overly simplistic in the modern digital world.[61] As the panel held, prolonged surveillance by invisible, automated devices that continuously gather and analyze detailed information about a person's movements for an unlimited period of time violates a reasonable expectation of privacy, constitutes a search, and requires a warrant.

A. Prolonged GPS Surveillance Technology is More Invasive Than Beeper Monitoring in Constitutionally Significant Ways.

There is a vast technical valley between the decades-old beeper technology this Court considered almost thirty years ago, and the advanced, automated GPS surveillance technology used today. Three aspects of GPS surveillance technology distinguish it from the "sense-enhancing" beeper technology considered in *Knotts* and establish its invasiveness:[62] 1) its automated nature; 2) the level of detail obtained about a person's life; and 3) its ability to store data for long periods for analysis and comparison.

i. Automated Nature of GPS

First, the beeper in *Knotts*, was "a radio transmitter, usually battery operated, which

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[61] Susan Brenner, *Ubiquitous Technology*, 75 Miss. L.J. 1, 83 (2005) ("The physical and informational barriers we once used to differentiate between our 'private' and 'public' selves are being eroded by technology, and the erosion is accelerating.").

[62] *See generally* Brief of Amici Curiae Electronic Frontier Foundation (filed October 3, 2011) ("EFF Brief") (discussing technical architecture of GPS surveillance technology).

emit[ted] periodic signals that [could] be picked up by a radio receiver."[63] The signal "got stronger the closer the police were to it," and disappeared permanently if they were too far away.[64] The beeper, considered an aid to following a vehicle through traffic, could neither determine location themselves nor store that data.[65]

GPS surveillance technology, by contrast, does not merely enhance traditional police surveillance, it replaces it with something different in kind and capacity.[66] It allows remote, automated collection of data about a target's location, movements, and speed of movement over an unlimited period of time. Once the GPS tracking device is installed, it can operate autonomously, without human involvement, independently determining and remotely transmitting positional data twenty-four hours a day. Unlike the beepers of yore, police officers need not trail the device or deploy a network of receivers in order to determine location information. As Chief Judge Kozinski puts it:

> Beepers could help police keep vehicles in view when following them, or find them when they lost sight of them, but they still required at least one officer-and usually many more-to follow the suspect. The modern devices used in

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[63] *Knotts*, 460 U.S. at 277.

[64] *Pineda-Moreno*, 617 F.3d at 1124 (Kozinski, C.J., dissenting) ("If no one was close enough to pick up the signal, [the data] was lost forever.").

[65] *Id.*

[66] *Jackson*, 76 P.3d at 223 (distinguishing GPS because officers do not actually follow vehicle).

> Pineda-Moreno's case can record the car's movements without human intervention.

Pineda-Moreno, 617 F.3d at 1124 (Kozinski, C.J., dissenting).

In this way, GPS eliminates the natural limitation placed on police surveillance capabilities by the limited number of officers available at any given time to track the public's movements. In the past, it was impossible for the police to assign an officer to track large groups of citizens around the clock.[67] Now, because the GPS satellite system can support an unlimited number of tracking devices, and because GPS surveillance technology is inexpensive and allows automated tracking, neither cost nor limitations on human resources imposes an impediment to pervasive surveillance of the populace.[68]

ii. Level of Detail Obtained by GPS.

Second, as the panel noted, prolonged surveillance by GPS "reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *Maynard*, 615 F.3d at 562;

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[67] Dorothy Glancy, *Privacy on the Open Road*, 2004 Ohio Northern University Law Review 295, 300.

[68] GPS surveillance technology "can provide law enforcement with a swift, efficient, silent, invisible and *cheap* way of tracking the movements of virtually anyone and everyone they choose." *Pineda-Moreno*, 617 F.3d at 1126 (Kozinski, C.J., dissenting).

id. at 560.[69] The GPS tracking devices sense their own location and can be equipped to both store that information on the device itself and transmit that information either in real-time or in bursts to remote law enforcement computers.[70] This flexibility represents a significant advance in location tracking, allowing collection of substantially more data over prolonged periods than that gained by short bursts of beeper-based tracking.[71]

As the government has recognized in law enforcement training documents, this capability renders GPS tracking devices "more intrusive" than beeper-style transponders.[72] The panel concluded that it is the ***prolonged*** nature of the surveillance that creates the problem, because GPS technology collects an unprecedented amount of detail on its target's movements, and accumulation of that detail over time gives the government information about every doctor visited, political meeting attended, and

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[69] *See also, e.g., In re Release of Historical Cell-Site Information*, 2011 WL 3678934 at *10-12 (E.D.N.Y. Aug. 22, 2011) (request for at least 113 days of cumulative cell-site location records for an individual's cell phone constitutes a search under the Fourth Amendment that requires a warrant); *In re Application of the United States for Historical Cell Site Data*, No. H-10-998M, 2010 WL 4286365 at *7-8 (S.D. Tex. Oct. 29, 2010) (historical cell phone records subject to Fourth Amendment under *Maynard* because records sought "are likely far more intrusive"; they reveal "a continuous reality TV show, exposing two months' worth of a person's movements, activities, and associations in relentless detail.").

[70] *See generally* EFF Brief.

[71] *Id.*.

[72] *See* Hodges, *Tracking "Bad Guys," supra* n.21, at 26.

bookstore patronized.[73] Prolonged GPS surveillance, as the panel concluded, invades a reasonable expectation of privacy because the detailed information obtained allows the government to develop an overall picture of people's lives that goes far beyond what individuals expect other individuals or the government to know about their public actions.[74]

This recognition by the panel that "the whole is something different than the sum of its parts,"[75] is not novel.[76] This type of analysis – rather than

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[73] *Id.* These aspects of life—freedom of expression through speech, decisions about sexuality and medical care, belief systems, political, religious or irreligious—are vital to our dignity, our interests in self-definition. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (expectation of privacy in medical tests); *see Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (interests in privacy central to personal dignity and autonomy); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (same); *see also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1735 (2008) (competing conceptions of dignity in Supreme Court doctrine create a principled framework for abortion regulation).

[74] *Maynard*, 615 F.3d at 562 (holding "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance").

[75] *Maynard*, 615 F.3d at 561 n.8; *id.* at 558 (explaining that the whole of one's movements over the course of a month "reveals more—sometimes a great deal more—than does the sum of its parts"); *id. at* 561-62 ("'What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene.'") (quoting *CIA v. Sims*, 471 U.S. 159, 178 (1985)).

[76] *See, e.g., Jackson*, 76 P.3d at 222 (nature and extent of information obtained concerning "a person's associations, contacts, finances, or activities is relevant" in deciding whether expectation of privacy exists).

reliance on a line between public v. private space -- is required by *Katz*, where the Court held that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[77] The panel's analysis has the benefit of protecting "people not places,"[78] and preventing the "too permeating police surveillance" presence warned of in *United States v. Di Re*.[79]

A rule requiring judges to decide when GPS surveillance is "prolonged" would not lead to judicial confusion and inconsistency.[80] Judges have long had to evaluate complicated and often fast-paced criminal investigations to determine when a given exception applies, such as when evidence is in danger of being destroyed, a suspect is likely to flee,[81] or a search serves "special governmental needs, beyond the normal need for law enforcement."[82] Making similar determinations about whether GPS surveillance technology is being used in a manner that should exempt it from the warrant requirement or instead in a "prolonged" manner to gather a long-term view of someone's life is no different. For example, to the extent GPS is used to trail a fleeing suspect[83] an

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[77] Katz, 389 U.S. at 351; *see also* Susan Brenner, *The Fourth Amendment in an Era of Ubiquitous Technology*, 75 Miss. L.J. 1, 26-27 (2005).

[78] *See Katz*, 389 U.S. at 361.

[79] *Di Re*, 332 U.S. at 595.

[80] *Cf* Brief of the United States at 31 ("Pet. Br.").

[81] *See, e.g., Katz*, 389 U.S. at 357-58 (discussing exceptions to rule).

[82] *See, e.g., Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989).

[83] Deanese Williams-Harris, *Police use GPS to track down bank robbery suspect*, CHICAGO TRIBUNE, (August 17, 2011) (police tracked bank robber's movements through a GPS device hidden

exception to the warrant requirement would apply. In fact, the rule is already being applied in the states which have held that warrants are required for GPS surveillance under state constitutions.[84]

Moreover, the *Maynard* panel did not consider use of GPS to follow a suspect on a single trip "prolonged" use requiring a warrant.[85] For example, in *United States v. Cuevas-Perez*,[86] the court distinguished the use of GPS surveillance of a single trip over sixty hours from the twenty-eight day surveillance in Maynard. In that case, "[u]nlike in *Maynard*, the surveillance . . . was not lengthy and did not expose, or risk exposing, the twists and turns of Cuevas-Perez's life, including possible criminal activities, for a long period."[87] In contrast, GPS monitoring performed by machines and designed to gather data to expose patterns of behavior, such as that in *Pineda-Moreno* and *Maynard*, should be considered prolonged and require a warrant. There

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with cash he stole), http://www.chicagotribune.com/news/local/breaking/chi-police-use-gps-to-track-down-bank-robbery-suspect-20110817,0,3267869.story.

[84] Washington, New York, Oregon, and Massachusetts require a warrant for police surveillance via GPS devices. *Weaver*, 909 N.E.2d at 1201-03; *Commonwealth* v. *Connolly*, 913 N.E.2d 356 (Mass. 2009); *Jackson*, 76 P.3d at 222-24; *State* v. *Campbell*, 759 P.2d 1040 (Or. 1988).

[85] *Maynard*, 615 F.3d. at 565 ("[s]urveillance that reveals only what is already exposed to the public—such as a person's movements during a single journey—is not a search.") (citing *Knotts*, 460 U.S. at 285).

[86] 640 F.3d 272 (7th Cir. 2011).

[87] *Id.* at 274-75; *but see id.* at 292-93 (Woods, J., dissenting) (stating "the majority's assertion that Cuevas–Perez's movements in this case can be categorized as a "single journey" under *Maynard's* reasoning, . . . is simply untenable").

may indeed be tough decisions for courts to make about whether an uninterrupted single trip constitutes prolonged use but first of all, that is not the situation in this case. Moreover, where it is the case, judges may consider the same criteria applied to other surveillance situations, such as the practical ability to obtain a warrant, in making those calls.

iii. Electronic Storage of Data.

Third, the electronic storage of gathered location data allows the data to be stored forever and considered alongside data collected from other sources. In contrast to beeper data which is lost because an individual does not record and store it, GPS computers can be programmed to operate independently and compare data gathered from different individuals, identifying common patterns of behavior and the gatherings of different groups of people.[88] As Chief Judge Kozinski commented:

> By tracking and recording the movements of millions of individuals the government can use computers to detect patterns and develop suspicions. It can also learn a great deal about us because where we go says much about who we are. ... Were Jones, Aaronson and Rutherford at that protest outside the White House?

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[88] *Cf. Pineda-Moreno*, 617 F.3d at 1124 (Kozinski, C.J., dissenting from denial of rehearing en banc) (distinguishing GPS system from beeper system on the basis that without human involvement, beeper data was "lost forever").

Pineda-Moreno, 617 F.3d at 1125 (Kozinski, C.J., dissenting). The new GPS technology is capable of retaining information forever, making those who have been tracked vulnerable to intrusive data analysis of where they went, and who they saw, for years after the fact.

Taken seriously the Court's mandate that we must not allow new technology to "shrink the private realm" requires us to examine the impact that the new means of surveillance will have on our privacy expectations.[89] We can not afford to revive the rejected doctrine of a strict line between public and private space dependent on notions of physical trespass.[90] As technology does things the Framers never thought possible, it changes what it means to cross into the private realm. If we eventually develop a means of reading minds,[91] it won't matter if that technological invasion takes place in the home or on the streets.

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[89] *Kyllo*, 533 U.S. at 37-39; *Whalen v. Roe*, 429 U.S. 589, 606-07 (1977) (Brennan, J., concurring) (asserting that the Fourth Amendment limits not only "the type of information the State may gather," but also "the means it may use to gather it"); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

[90] *See also* Hutchins, *Tied up in Knotts?*, *supra n. 63*, at 432 (arguing that warrant rule must apply because technology develops broad view of individuals).

[91] *See* Eben Harrell, *Fighting Crime by Reading Minds*, TIME SCIENCE, Aug. 07, 2010, available at http://www.time.com/time/health/article/0,8599,2009131,00.html.

B. Studies Show that People Do Not Expect to be Subjected to Pervasive Surveillance Technology Without Their Knowledge or Consent.

Further supporting reasonable expectations of privacy in our movements, and as the panel correctly noted, we have not become a society that expects constant surveillance of our daily activities.[92] As Chief Judge Kozinski recognized,

> You can preserve your anonymity from prying eyes, even in public, by traveling at night, through heavy traffic, in crowds, by using a circuitous route, disguising your appearance, passing in and out of buildings and being careful not to be followed.

617 F.3d at 1126 (Kozinski, C.J., dissenting). We value the privacy of data revealing our location and we actively resist relinquishing our ability to remain anonymous in public. Many Americans are comfortable with use of a GPS service to determine their own personal location when that service operates subject to their consent and control.[93] The

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[92] *Maynard*, 615 F.3d at 563 ("A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car"; "rather, he expects each of those movements to remain 'disconnected and anonymous.'"). *See also Kyllo v. United States*, 533 U.S. 27, 28 (2001) (examining whether technology was in general public use); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 Miss. L. Rev. 213, 235 (2002) ("Camera Surveillance") (arguing that the Fourth Amendment protects a right to anonymity).

[93] Subscription services such as LoJack and OnStar can access an automobile's location and even transmit this location in case of emergency or theft, but only do so with the consent of the

public does not, however, accept unrestrained GPS *surveillance* technology; we retain an expectation that we are not being followed perpetually by an invisible computerized eye in the sky. In fact, Americans become uncomfortable with GPS when it leads to even a slight loss of user-control and threatens the loss of public anonymity.

For example, despite a strong push by companies encouraging Americans to adopt "geosocial" software that would allow users to broadcast their locations to selected friends using GPS in their phones, only four percent of adult Americans use these services.[94] Moreover, a 2008 survey conducted by the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law found that 73% of survey participants supported strong judicial intervention before law enforcement could access historical location data.[95]

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user. Contrary to Judge Posner's assertion, Google Earth, the web service providing satellite images of the ground, cannot track people or vehicles in real time. *See United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007).

[94] 4% OF ONLINE AMERICANS USE LOCATION-BASED SERVICES at 2 (PEW RESEARCH CENTER'S INTERNET AND AMERICAN LIFE PROJECT NOV. 4, 2010), *available at* http://pewinternet.org/Reports/2010/Location-based-services.aspx.

[95] Jennifer King and Chris Jay Hoofnagle, RESEARCH REPORT: A SUPERMAJORITY OF CALIFORNIANS SUPPORTS LIMITS ON LAW ENFORCEMENT ACCESS TO CELL PHONE LOCATION INFORMATION, AT 8-9 (April 18, 2008), *available at* . It follows from this desire to protect anonymity in public, that people would view surreptitious attachment of GPS surveillance devices on their cars as a "meaningful interference with an individual's possessory interest in that property." *See Karo*, 468 U.S. at 712

In another context, the federal government has recognized that members of the American public maintain a reasonable expectation of privacy in data about their movements from place to place throughout the day. To recruit volunteers whose vehicles would be equipped with GPS devices for a federally-funded study to assess a new mileage-based tax, study organizers felt it necessary to assure volunteers that "[n]o detailed route information regarding your driving will be stored or collected."[96] Organizers also assured participants that they would maintain information about mileage in "highly secure locations" in a separate database on a separate server from their personal information.[97] The organizers' assurances indicate their recognition of a reasonable expectation of privacy in data about public movements.

Some commentators have criticized taking the public's reaction to surveillance technology into account, pointing out that the expectation of privacy does not hinge on whether monitoring is likely to occur or whether the public expects monitoring to

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(quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). *See also* Brief for Respondent at 50-52.

[96] *National Evaluation of a Mileage-based Road User Charge, Privacy of Information*, UNIVERSITY OF IOWA PUBLIC POLICY CENTER, *available at* http://www.roaduserstudy.org/faq.aspx#privacy (last visited Dec. 5, 2010).

[97] *National Evaluation of a Mileage-based Road User Charge*, UNIVERSITY OF IOWA PUBLIC POLICY CENTER, http://www.roaduserstudy.org/Default.aspx (last visited Dec. 5, 2010) (describing federal pilot program tracking vehicles with GPS); *See id.* & *video available at* http://www.roaduserstudy.org/howitworks.aspx. (last visited Dec. 3, 2010).

occur. However, taking into account the public's *resistance* to technology that will track their every movements is relevant to a showing of the private nature of location data. Of course, as in Orwell's *1984*,[98] and the contemporary children's book *The Hunger Games*,[99] when the occurrence and expectation of monitoring both increase and thus the expectation of freedom from monitoring diminishes, constitutionally protected privacy interests suffer greatly.[100] As many have noted, when our activities, thoughts, and behaviors become known to others, our sense of self shrinks—from shame, from fear, from embarrassment, or simply from a loss of the ability to control the distribution of information about us.[101] The expectation that these "private" matters will become known will change our behavior and ultimately who we are. In constitutional parlance, it chills the exercise of constitutionally protected activity, speech, thoughts, and behaviors—especially those that involve criticisms of the existing government or that are seen as undesirable by

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[98] While the world of Orwell's *1984* may be our most culturally recognizable icon of totalitarianism and as such is an overused reference point, it is no less illustrative for that status.

[99] Suzanne Collins, THE HUNGER GAMES (Scholastic 2008) (describing society where the activities of citizens are monitored and, in some instances, broadcast over television).

[100] *See, e.g.*, *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) (discussing surveillance under a totalitarian regime).

[101] Christopher Slobogin, *Camera Surveillance*, 72 Miss. L. Rev. at 236 (anonymity in public promotes "open society"; "Lack of public anonymity promotes...an oppressive society.").

government officials.[102] Indeed, if individuals have come to expect that information about their every movement *is* being collected and stored for analysis, then a fundamental goal of the Framers has been abandoned. Maintaining privacy in group associations "may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[103]

While we presume that most law enforcement officers use tracking devices in good faith, this Court has recognized that the warrant requirement provides a crucial check on misuse of these powerful tactics.[104] Used *with* a warrant requirement, GPS surveillance technology gives law enforcement a powerful crime fighting tool that will not invade privacy unnecessarily. *See Karo*, 468 U.S. at 717 (warrants prevent abuse of technology). *Without* a warrant requirement, GPS, like wiretaps and thermal imaging devices, "shrink[s] the realm of personal privacy," *Kyllo*, 533 U.S. at 34, beyond the dreams or nightmares of the Framers.

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[102] *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) (likelihood of prosecution for speech may cause "serious chill upon protected speech").

[103] *NAACP v. Alabama*, 357 U.S. 449, 462. "[W]rits of assistance and general warrants are but puny instruments of tyranny and oppression" when compared with the power of GPS surveillance technology. *See Olmstead*, 277 U.S. at 476 (Brandeis J., dissenting).

[104] *See, e.g., U.S. Dist. Ct.*, 407 U.S. at 314.

C. GPS Surveillance Also Invades a Reasonable Expectation of Privacy Because It is Hidden, Continuous, Indiscriminate and Intrusive.

GPS surveillance also invades a reasonable expectation of privacy using a four factor test proposed for determining whether there is an expectation of privacy in location data.[105] Borrowing from a decision by Judge Posner concerning the nature of television surveillance,[106] Susan Freiwald argues that surveillance that reveals location information should be judged by whether it is hidden, continuous, indiscriminate and intrusive.[107] Others scholars, pointing out that *where* behavior occurs is not always determinative of the private nature of that behavior,[108] have proposed similar tests for evaluating the intrusiveness of a surveillance technology,[109] and for evaluating the

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[105] Susan Freiwald, *Cell Phone Location Data and The Fourth Amendment: A Question of Law, Not Fact*, 70 Maryland L. Rev. 681, 746 (2011) ("*Cell Phone Location Data*"); Susan Freiwald, *First Principles of Communications Privacy*, 2007 Stan. Tech. L. Rev. 3.

[106] *See United States v. Torres*, 751 F.2d 875, 882-85 (7th Cir. 1984) (television surveillance is exceedingly intrusive and could be abused to eliminate privacy).

[107] *Cell Phone Location Data*, 70 Maryland L. Rev. at 746.

[108] Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. at 1144-45 ("privacy must be valued contextually."); Nissenbaum, *Contextual Integrity*, 79 Wash. L. Rev. at 138.

[109] *See* Renee MacDonald Hutchins, *The Anatomy of a Search: Intrusiveness and the Fourth Amendment*, SEARCH AND SEIZURE LAW REPORT (2011) (advocating adoption of intrusiveness as the benchmark for assessing a search and requiring an examination of two factors: the functionality of a challenged

specific context in which the surveillance technology is being used to determine whether a violation of privacy has occured.[110] As Helen Nissenbaum argues, "the notion that when individuals venture out in public . . . 'anything goes,' is pure fiction. . . .[E]ven in the most public of places, it is not out of order for people to respond . . . 'none of your business,' to a stranger asking their names."[111] Similarly, A. Michael Froomkin writes that "at least in large cities, one enjoys the illusion, and to a large extent the reality, of being able to move about with anonymity."[112] In fact, in light of the impossibility of keeping all information secret in the digital age, clinging to the idea of privacy as a form of total secrecy "would mean the practical extinction of

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form of surveillance and the potential for disclosure created by the device); Christopher Slobogin, *Camera Surveillance*, 72 Miss. L. Rev. at 270 (examining privacy expectations through study of subjects' sense of the intrusiveness of public surveillance using video cameras).

[110] Nissenbaum, proposes that whether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared . . . ; and the terms of further dissemination." Nissenbaum, *Contextual Integrity*, 79 Wash. L. Rev. at 155.

[111] Nissenbaum, *Contextual Integrity*, 79 Wash. L. Rev. at 139; *id.* at 143 (arguing that "a privacy violation has occurred when . . . contextual norms of appropriateness . . . have been breached.").

[112] A. Michael Froomkin, *The Death of Privacy?*, 52 Stan. L. Rev. 1461, 1476 (2000).

privacy in today's world."[113] Under all of these tests, GPS surveillance requires a warrant.[114]

CONCLUSION

The panel's approach to evaluating privacy expectations in public behavior will preserve privacy in a digital age and protect the public from overuse of law enforcement surveillance. Without a warrant requirement to guide its use, the potential for abuse of GPS surveillance technology is unprecedented and its use will significantly "shrink the realm of personal privacy." *See Kyllo*, 533 U.S. at 34. Therefore, the court should affirm the decision below.

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October 3, 2011

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[113] Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. at 1155.
[114] *See In re Release of Historical Cell-Site Information*, 2011 WL 3678934 at *10-12.